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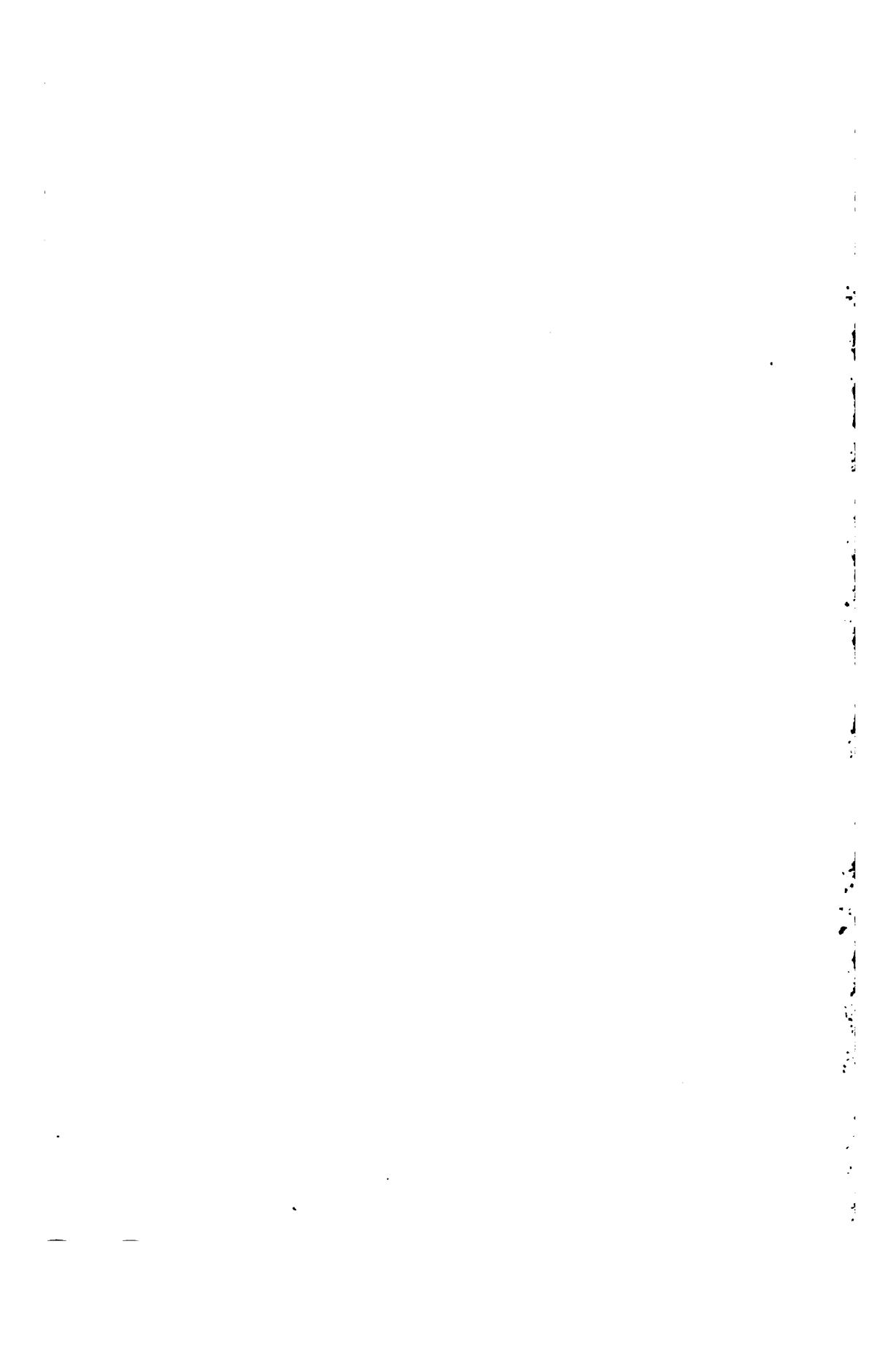
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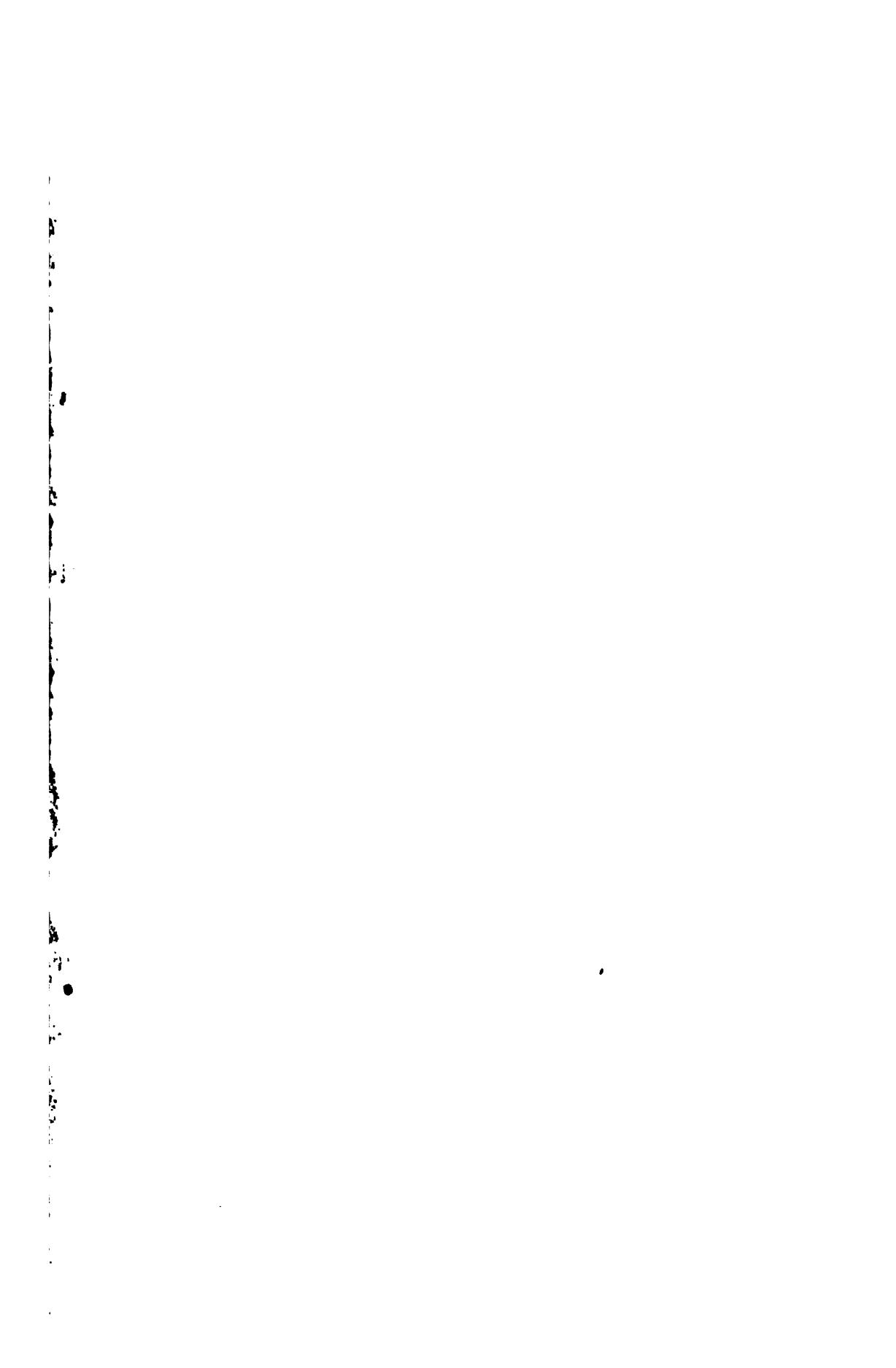
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NO. 1.

THE STORY OF MORTGAGE LAW.

THE idea of a lien upon the property of another is simple, and easy of apprehension. It must have prevailed at all times and among all civilized nations, and we find it in every system of law of which we have knowledge.¹ It is so general and so deeply rooted among our people, that persons are constantly imagining a lien in cases where the law provides none. One new lien follows another in legislation, and each new-comer readily domesticates itself in the popular thought and speech.

It is not essential to a ready apprehension of the idea of lien that the property be in the lienor's possession. A sailor's lien for wages follows a vessel all over the world, and an ignorant seaman, on shore at Liverpool or at Boston, easily understands the hold which he has on a ship at the Straits of Malacca. The statutory mechanic's lien and material-man's lien on buildings and land, the liens of attaching and of judgment creditors, and tax liens on real estate, are thoroughly at home in the popular mind, so that a proposition to sell a house subject to mechanics' liens, or to taxes, conveys a precise and well-defined idea.

There is nothing necessarily artificial or complex, therefore, in the giving of security upon real estate. The right to be given is easy of apprehension and easy of expression. "In case I

¹ See Hamilton's *Hedaya*, book xlviii., *Pawns*.

should despise thee," says an ancient recorded Egyptian marriage settlement, extremely detailed in its provisions, " in case I should take another wife than thee, I will give thee twenty argenteus, in shekels one hundred, twenty argenteus in all. The entire of the property which is mine and which I shall possess, is security of all the above words until I shall accomplish them according to their tenor."¹ Nevertheless, in our form of giving security on real estate to secure a common debt, or otherwise to provide assurance, we find a contract so artificial and so difficult of apprehension as to elude definition. In speaking of real-estate mortgages in England, where, from a difference in theory between the English law and ours, to be noticed later, the difficulty of definition is less than it is with us, one of the clearest of modern writers, Mr. Williams, attempts to avoid the defects of earlier definitions by defining a mortgagee's estate in land as " a mortgage debt;"² and yet he is compelled, in the very first page of a chapter so entitled, to admit that a debt is not an essential feature of a mortgage estate;³ for of course there may easily come to exist, in any one of a variety of ways, a mortgage without a personal liability.

A common mortgage deed is, in its form, neither more nor less than a deed upon condition. It first professes to convey the land outright; it then goes on with a proviso that upon payment of a certain sum at a certain day, for instance, the conveyance shall be null and void. It is precisely in the form of deeds upon condition, such as are given without the slightest color of the idea of mortgage. A deed on condition that the grantee shall build a mill on the land within two years,⁴ and a deed on condition that the grantee shall pay a certain note within two years, may be word for word in the same form; and yet, while the one is in fact a conveyance upon condition, and may give a fee, the other is a mortgage, and gives only a chattel estate in the land,—only a lien. A person unfamiliar with the English and the American law, but versed in the English tongue and in law in general, would never dream that a deed in this form, apparently clear and

¹ Records of the Past, vol. x. pp. 75-78, where the instrument is characterized by the learned editors as a "mortgage." Comp. Just. Inst. l. iv. tit. 6, § 29.

² Williams, Real Prop. 421.

³ Ibid.

⁴ Langley v. Chapin, 134 Mass. 82.

intelligible in its terms, could have for its single object the creation of a lien.

The writer to whom allusion has just been made is entirely capable of defining anything which is capable of definition, and the difficulties which he and every one else meets in attempting to define a mortgagee's estate in land, lie in the fact that in the creation of this lien we employ fictitious statements, and with the resulting obscurity which usually attends upon fictions. A common mortgage deed says one thing; it really means another thing; and yet there cling to the net result certain barnacle features, due to what the writing says but does not mean. A mortgage deed commonly professes to vest in the grantee real estate; it really vests in him, in this country, only a chattel interest in real estate. It declares that upon default the mortgagee shall at once, by the mere operation of the deed, have an absolute title, free from all right of the grantor; it really gives the grantee, from the time of default, a mere right to enforce payment or indemnity. It professes to leave in the grantor nothing but a right of re-entry upon certain terms; it really leaves in him, in this country, the absolute ownership, subject, it is true, to a charge, but only as the ownership of land may always be subject to a charge,—for taxes, for an annuity, for a mechanic's lien, for debts of an owner deceased. It must have the word "heirs,"¹ or the security dies with the mortgagee, even though the debt is unpaid; yet the interest granted is not realty; there is no dower or courtesy in it, because it is not real estate, and it goes to the executor, and not to the heirs. In Massachusetts a mortgage on land is attachable as realty if owned by a State bank or a domestic insurance corporation;² otherwise not. We find it laid down, on the one hand, in the law reports and statutes of a given State, that a mortgage of land is a mere "pledge" or "hypothecation" of it, and creates only a "lien";³ that a mortgagor by deed and defeasance may relinquish his title by simply cancelling his bond of defeasance;⁴ and yet we find in the same reports the doctrine laid down that, unless the condition is performed on the day fixed, the mortgagor's

¹ *Sedgwick v. Laffin*, 10 All. 430; *Allendorff v. Gaugengigl*, 146 Mass. 542; 1 Jones, Mortg. § 67.

² Mass. Pub. Sts. c. 118, § 92; St. 1887, c. 214, § 27.

³ *Jackson v. Mut. Fire Ins. Co.*, 23 Pick. 418, 424; *Ewer v. Hobbs*, 5 Met. 1, 3; *Butler v. Page*, 7 Met. 40, 43; Mass. Pub. Sts. c. 178, § 44.

⁴ *Trull v. Skinner*, 17 Pick. 213.

ownership of the land is gone, at law, and the legal ownership is now in the mortgagee,¹ subject only to a right of redemption in equity,—a proposition maintainable only by viewing the mortgage deed as a deed on condition and not as a deed creating a lien.

The truth is, that what the deed says, and what some centuries ago it really meant, the courts have gradually forced into meaning a very different thing; and that legislators, through caution, or through lack of progressive thought, have chosen to import from time to time new contract features into the ancient form, rather than to establish a new form, or to revert to an ancient form in harmony with fact. And so it is that while a mortgagee's interest in land has for a long period, in this country, been a mere chattel estate, and has amounted in substance to a mere pledge of the land, and is constantly characterized as such, we still continue to create it by a deed professing in terms to grant a conditional fee, and permit it to cling to the contract, like a lichen growth, certain embarrassing features of real-estate title.

The story of the way in which this has come about offers to students of law a suggestive lesson in processes of legal thought. The explanation of our present confusion of thought and falsity of statement in mortgage law, and of the singular divergence, by a mere popular drift and without legislation, between England and this country on this head, and, to a certain extent, between two sets of States of the Union, can be explained only by going back to the sources of our mortgage law. But although we have to go so far for a starting-point, we shall not lose ourselves in the obscurity of a dim past, or be disturbed by vagueness in the connection of events.

In nothing are the traditions of a people more rigid than in the matter of actual land titles and land-title law. The law of land in the States of our Union is full of principles and arbitrary conventions established in England long before the Conquest,—such, for example, as dower, and the forty days' right of a widow. It would probably have been impossible for the Norman judges, after the Conquest, to subvert, if they had desired so to do, the existing land law of England. But those judges enriched and amplified the existing system, and filled its gaps, as occasion was,

¹ *Currier v. Gale*, 9 All. 522.

by drawing upon the highly elaborated foreign system of law with which, through the medium of Italian writers, they were familiar.

The Roman law, which these judges knew, — “the spring-head of the English jurisprudence upon the subject of these securities,”¹ — offered a simple, rational, and convenient system of pledging land. When a lien was to be created, it went about the creation of it simply. The lender was to have a lien; it gave him nothing less, nothing more, stating frankly that it did so. Moreover, to meet the necessities of practical affairs, it did not require a transfer of possession. That was as the parties might agree. The law of Attica, in a remote antiquity, had done the same, indicating a pledge without possession by a pillar or tablet set up on the land, inscribed with the creditor’s name and the amount of the debt. That feature of the reforms of Solon which extinguished mortgage debts was characterized as having removed the pillars from Attica.²

The Roman law made no material distinction, in matter of pledges, between land and chattels. The system was one and the same for a farm and for a cart. If a pledgee took possession, the transaction was a pawn; if not, it was a hypothecation. And to obviate embarrassments from the pledgor’s retaining possession, and with it a show of ownership, it was quite early provided that a fully effective hypothecation could be made only by some notorious act recognized by law, as by registration in a public office.³

It fortunately happened that this system was entirely in harmony with the ideas already existing among the English people. Its plain and natural scheme would seem to have been, if not instinctive with the whole human race, at least common to the Indo-European stock. It is set forth with great distinctness and full elaboration in the early law of India.⁴

The Anglo-Saxon word for pledge was etymologically the same as the Roman word, *vadium*. This fact, of itself, at least suggests a community of ideas of immemorial antiquity. The Saxon law seems very clearly to have run parallel with the civil law, even to

¹ Swayne, J., *Gilman v. Ill. & Co. Tel Co.*, 91 U. S. 603, 615.

² Grote, *History of Greece*, vol. iii. part ii. chap. xi., where the historian quotes from a fragment of the iambics of Solon a striking personal appeal to the Earth, addressed as having passed by Solon’s hand from slavery into freedom.

³ Cod., l. viii. tit. 18, § 11; Sandars, *Just. Inst.* 227. . See Cod., l. viii. tit. 18, § 11.

⁴ The *Hedaya*, book xviii., and see, in particular, chap. ii.

the point of registration, which was effected in early England by depositing a written instrument in the county court or in a monastery.¹ It is interesting to notice that, upon the settlement of this country, a system of registration of deeds instantly sprang up, fully developed, as if it were an underground stream suddenly risen to the surface.

When, therefore, after the Conquest, lenders desired to advance money upon landed security, the Norman judges had ready at hand, in their own civil law, fully worked out, a simple and practical system of giving security, entirely consonant with the habits of thought of the English people.

Using the word *vadium*, gage, whether the possession was to be turned over to the pledgee or not, the Norman judges recognized gages or pledges of land, either with or without transfer of possession. If the pledgee took possession, the transaction was a pawn;² if not, it was a hypothecation.

It would be the greatest mistake to suppose that feudal seisin was essential to an effectual pledge of land in feudal times. The pledgee might leave the pledgor in possession, and still be secure, by recording a written contract of pledge in the King's Court;³ precisely as, under Justinian, such a contract would have been registered in a public office, or, under the Saxon laws, in a county court or a monastery. This provision for registration was a mere adaptation to English ground of the Roman system.

Even when the pledgee of land, in feudal times, took possession, he did not take a full feudal seisin; he took only a "*quasi*" seisin,⁴ a seisin "*de vadio*,"⁵ as it was called,—a "pledgee's

¹ 2 Bl. Com. 342, 3.

² 4 Bract. (Rolls Ed.) 74, 236

³ Quandoque vero convenit inter debitorem et creditorem de re aliquâ invadiatâ, acceptâ à debitore re mutuatâ, si non sequatur ipsius vadii tradito, quomodo confuletur ipsi creditori in tali casu, maxime cum possit eadem res pluribus aliis creditoribus, tum prius tum posterius, invadari? Super hoc notandum est, quod Curia domini Regis hujusmodi privatas conventiones de rebus dandis vel accipiendo in vadium, vel alias hujusmodi, extra Curiam sive etiam in aliis Curis quam in Curia domini Regis factas, tueri non solet nec warrantizare; et ideo si non fuerint servatae, Curia domini Regis se inde non intromittet, ac per hoc de jure diversorum creditorum priorum vel posteriorum aut de privilegio eorum, non tenetur respondere. Glanv., lib. x. c. 8. It is very singular that Blackstone, in quoting from this passage, garbles it, and omits the vital qualification *extra curiam . . . factas*, thus entirely reversing the sense. See also, as to agreements made in the King's Court, Glanv., lib. viii cc. i.-iii

⁴ Bract. (Rolls Ed.) 74, § 4.

⁵ Glanv., lib. xiii cc. 2, 26-30; 4 Bract. (Rolls Ed.) 236-240.

seisin," — a seisin distinct from a general seisin, not exclusive of that of the pledgor, but consistent with and dependent upon it, — a parasitic seisin. The word "seisin," of course, was not exclusively applied to freehold estates in land, but was used of chattels and of chattel estates in land, as leaseholds. And just as a lessee of land had not a seisin of his own, but had his landlord's seisin, so in the case of a pledge, even with possession, the freehold was deemed to remain in the pledgor, and the pledgee was said to be seised "through" the owner of the fee,¹ — to be seised not in his own name, but in the name of another.² The heirs of a pledgee who died in possession were spoken of in contradistinction from the "*verus haeres*."³ The fact that land so in pledge, and even in the possession of the pledgee, was still viewed as in the seisin of the pledgor, appears from the fact that it was subject to dower, not of the pledgee's, but of the pledgor's widow;⁴ and there could be no dower without seisin. If a pledgee in possession were ousted by a stranger, he could not maintain a writ of novel disseisin to recover possession: the pledgor had to bring the action, counting on his own seisin.⁵ And where one seized as pledgee died in possession, and his heir, being excluded, brought a writ of *mort d'ancestor*, to get possession, he was provided, not with the ordinary writ of *mort d'ancestor*, counting upon seisin generally, but with a special writ, alleging in his ancestor a seisin *de vadio*.⁶

The legal remedy for enforcing a simple gage or pledge of land, in the time of Glanville, so far from having those harsh features which we are wont to attribute to our early law, followed that just and equitable system of Roman law which was the cradle of our equity. When a debt secured upon land was due, the pledgee had a writ expressly framed for foreclosure,⁷ substantially identical with the Massachusetts writ of entry for foreclosure of a mortgage. The process could be enforced by the courts by a

¹ Glanv., lib. xiii. c. 11: "Qualemque seisinam, scilicet per ipsum tenentem vel per aliquem antecessorem ejus, veluti in vadio."

² 4 Bract. (Rolls Ed.) 550, "de vadio, . . . et sic in nomine alieno."

³ Glanv., lib. xiii. c. 28.

⁴ 4 Bract. (Rolls Ed.) 548: "Si autem invadiaverit," etc.; 550: "Item quod nunquam," etc.

⁵ Glanv., lib. x. c. 11.

⁶ Glanv., lib. xiii. cc. 26-30.

⁷ Glanv., l. x. c. 7. "Rex vicecomiti salutem: Præcipe N. quod juste et sine dilatatione acquietat rem illam quam invadiavit R. pro centum marcis usque ad terminum qui præteriit, ut dicit, et unde queritur quod eam nondum acquietavit; et nisi fecerit," etc.

seizure of the property pledged, if it remained in the pledgor's possession, or by other distress; and there was a conditional judgment precisely as there is upon the Massachusetts writ of entry for foreclosure, that the debtor should still have a reasonable time to pay before the foreclosure should become absolute.¹

The word "mortgage" had already come into vogue in Glanville's day. It was employed to designate that species of pledge in which, by the terms of the bargain, a pawnee of land, a pledgee in possession, was to keep the income or profits of the land without applying them to payment of the debt. The word "mortgage"—dead pledge—was used precisely as we use the phrases, "dead capital" and "dead investment." Land in the possession of a pledgee upon these terms was dead; it gave no return to the owner.² This feature of a contract of pledge, although not prohibited, was looked upon as unjust and dishonest, and was viewed as savoring of usury. "Hence," says Glanville, "if any one die having such a pledge, and after his death this be proved, his goods are to be treated as the goods of a usurer."

As early as the time of Glanville, a form of contract had come into vogue, by which one might pledge his property on the terms that, upon default, the pledgee's interest should by the mere force of the contract convert itself into a fee and become absolute.³ This form of contract was still in use when Bracton wrote, seventy years later, about A.D. 1250.⁴ The plan was this: One who desired to borrow on land, granted the land to the lender, in pledge, remainder to the grantor, the borrower, in fee, on the expiration of the *vadium*, *i. e.*, on payment of the debt. If the pledge were *pignus*, and the pledgee were in possession on the day of default, his freehold began at once in possession; if not, he had to resort to a real action to get possession;⁵ but his title was absolute. The time being come and the money not paid, the foreclosure was automatic.

¹ See Glanv., lib. x. c. 8.

² Glanv., lib. x. c. 8. See Beames's Glanville, lib. x. c. 8, note.

³ Glanv., lib. x. c. 6.

⁴ 1 Bract. (Rolls Ed.) 156, 160; 4 ib. 258: "Creditor incipit possidere in feodo . . . in crepusculo si ad diem, . . . et ita eodem modo quo prius statim et sine mora descendit jus merum ipsi creditoris." 1 Bract. (Rolls Ed.) 236, 8. The language used by Bracton, and the probabilities, indicate that this device was brought in from the civil law. In 1 Bract. (Rolls Ed.) 146, certain forms of conditional grants are openly derived from the civil law.

⁵ 1 Bract. (Rolls Ed.) 160, *ad fin.*

Certainly this system was efficient enough. The only thing of which the pledgee could in the least complain was, that in any action which involved the validity of his title, the burden of proof was always on him to show the debt. This difficulty the lender class next set themselves about getting rid of. If it could be contrived to give the lender, at the outset, not a mere title *de vadio*, but a title *prima facie* absolute at its inception, that is, absolute unless and until defeated by affirmative proof of payment, the final problem would be solved. Such a step would give the creditor full and unqualified seisin in the first instance, leaving the debtor only a right to end that seisin by paying according to the strict letter of the deed, and consequently would throw the burden of proof upon the borrower, the pledgor, in any contest which might arise. The solution of the problem was very early found in the use of the deed upon condition.

We find no trace in Bracton of any such use of a deed upon condition, and it is quite safe to assume that the device of employing it for security had not then been invented; but from the great variety of instances of conditional grants of which Bracton speaks, based on the civil law, it is plain that it only remained for some one to make the experiment. The experiment was made, and the practice, once begun, quickly threw into disuse the mere pledge; and security upon land now came to be exacted and given by an outright conveyance of the fee, conditioned to be void in case the grantor should within a certain time pay a certain sum, but otherwise to stand absolute. This was precisely our modern mortgage. As it reads upon the records in Boston and in Portland, so it read in England in the thirteenth century.

At a very early period the courts began to interpose to defeat the strict operation of these conditional deeds. really given for mere security.

Equitable interposition in this regard is commonly attributed to courts of equity as distinguished from courts of law; but it very probably began long before the establishment of distinct chancery tribunals. If the public opinion of early England demanded a softening of established rules, that modification could perfectly well be effected in England, as it was in Rome, by the introduction of equity into law, through the allowance of exceptions founded on equitable grounds. In very early times

the courts of law in England showed themselves capable of equitable procedure.¹ Glanville and Bracton are full of allusions to it. The foreclosure process to which allusion has been made above, allowing the debtor to pay and redeem, even after default and suit brought, was a distinctly equitable, as distinguished from a legal, proceeding, and very likely represented the result of a very ancient struggle between courts and creditors, just such as we are now describing, a struggle repeated time and again in the history of the human race.²

It was not all at once, of course, that the courts began to recognize as a general right, in every case of a deed on condition given for security, such a thing as an "equity of redemption." Very likely the general judgment of men may have been, at the outset, that no such general right, amounting in its fixedness to an equitable estate in the land, was called for; and perhaps the automatic foreclosure, at a day fixed, of a security by conditional deed may have seemed to our ancestors no more harsh than the abrupt and final cutting off of an equity of redemption after the end of a fixed period allowed after entry, seems to us. It was only as the result of a very long succession of decisions, in repeated instances, that such a general right came to be recognized and given a name. At last, however, and long ago, as we all know, the right of him who had given a deed on condition for the purpose of securing payment of a debt, or otherwise of providing assurance, ceased to be discretionary, and came to be a fixed equitable estate in the land.

At a period, therefore, prior to the settlement of this country, the law of security on land had gone through several stages. It had begun with the plain and simple system of pledge of the Roman and Saxon law, with a foreclosure procedure equitable to the debtor. It had gone through successive stages of devices by creditors to cut down the debtor's right, and it had ended with a system by which the debtor's substantial rights were guarded very much as they had been at the time of the Conquest,—a system, however, which employed a form of instrument most ill adapted to its purpose, making him who really should have had only a lien, the owner of the land at law, and involving the neces-

¹ 3 Bl. Com. 49-52.

² As to the employment of substantially this device, to avoid the Roman law of pledge, see Moyle, Imp. Just. Inst., vol. i. pp. 315, 316.

sity of two distinct sets of tribunals to cover the whole field of the respective rights of the parties.

Still another scheme of conveyance was devised. It made use of two instruments. The first was a deed of the land from the debtor to the creditor, absolute in form. Concurrently with it the creditor gave to the debtor a bond, which came to be known as a bond of defeasance, agreeing that if a certain sum of money, for instance, were paid by a certain day, the deed should become inoperative; or, to use another form, that the grantee, the creditor, would reconvey. It was attempted by this devise to make the transaction operate as a sale of land, with an option of buying back.¹ If it could so operate, the debtor's rights would be lost immediately upon default. The courts of equity, however, decided in England, and it was very early decided in this country at law, that such a transaction, if intended in fact for mere security, was nothing but a mortgage. In this country a distinction has been made, but, as it seems to the writer, upon not very satisfactory grounds, to the effect that if the defeasance is not sealed, it operates only in equity to turn the deed into a mortgage, having no broader effect, therefore, in this respect, than a mere oral agreement of defeasance.²

Still another form of conveyance was tried. The land was conveyed to the creditor or to some third person upon the trust that it was to be availed of by holding it to the creditor's use, or by selling it, in case of a failure to pay the sum secured, and paying the debt from the proceeds. This form of security attained great popularity, and is now in use in a large number of our States, and it is used in all the States for bonded debts. As a device to avoid the law of mortgage, however, this scheme failed; for the courts decided that a deed, in form a trust deed, but given in fact as security, did not convey a trust estate, but was a mortgage, and gave nothing but a mortgagee's estate.³

This left several forms of conveyance in use, no one of them professing to create a mere lien, all diverted from their original office, all warped away in operation from their language, all nevertheless, diverse as they were, resulting in one and the same contract.

¹ See Moyle, Imp. Just. Inst., vol. i. pp. 315, 316.

² Kelleran *v.* Brown, 4 Mass. 443. See Stocking *v.* Fairchild, 5 Pick. 181.

³ See Alison, *in re*, 11 Ch. D. 284; Locking *v.* Parker, L. R. 8 Ch. 30; Teal *v.* Walker, 111 U. S. 242.

Still another device remained to be tried. Driven from every form of deed which in any way admitted or indicated on its face the notion of security, ingenious conveyancers devised the plan of having a necessitous borrower convey his land to the creditor outright, taking back no writing whatever, but trusting entirely to an oral understanding. But no sooner did courts of equity lay hold of this new enterprise, than they declared this also to amount in equity to a mortgage; and in England, where the mortgagor's estate is in all cases merely equitable, a mortgage in this form does not essentially differ in results from a mortgage by conditional deed.

There remains to be recounted perhaps the most interesting stage of all in the story of mortgage law; namely, the radical divergence, without legislation, of this country from England.

When this country was colonized, about A.D. 1600, the law of mortgage was perfectly well settled in England. It was established there that a mortgage, whether by deed upon condition, by trust deed, or by deed and defeasance, vested the fee, at law, in the mortgagee, and that the mortgagee, unless the deed reserved possession to the mortgagor, was entitled to immediate possession. Theoretically our ancestors brought this law to America with them. Things ran on until the Revolution. Mortgages were given in the English form, by deed on condition, by deed and defeasance, or by trust deed. It was not customary in Plymouth or Massachusetts Bay, and it is probable that it was not customary elsewhere, to insert a provision that the mortgagor, until default in payment, should retain possession. Theoretically, during the one hundred and fifty years from the first settlement to the Revolution, the English rules of law governed all these transactions, and, as matter of book law, every mortgagee of a house or a farm was the owner of it, and had the absolute right to take possession upon the delivery of the deed. But the curious thing about this is, that the people generally never dreamed that such was the law.

As there gradually grew up a class of trained lawyers, they must have ascertained what the book law on the subject was. The people, however, took issue with them. To set the dispute at rest, and to inform the people what the law was, Judge Trowbridge, of the Supreme Judicial Court of Massachusetts, undertook to explain the law to his fellow-citizens, in a semi-official deliverance, known as "Judge Trowbridge's Reading," a paper which was deemed of so

high authority that it was printed after the author's decease in the law reports,¹ a fact which would seem to indicate the concurrence of the court. This paper laid it down explicitly that the mortgagee was the legal owner of the land, and that the farmers and householders throughout Massachusetts, whose lands were mortgaged, were not the owners of their farms and their houses, but had mere equitable estates. It is quite safe to assume that this opinion was held by the learned in the law throughout the country. Theoretically it was law. Gradually the question came up for decision in the different States, and, contrary to all theory, it was everywhere held that in this country a mortgage deed, although in the form of a common-law deed upon condition, amounted before breach to nothing but a pledge of the land, and gave the mortgagee simply a pawn or a hypothecation of it.

But while it was held in almost all, if not all, of the States that as to every one but the mortgagee the mortgagor was the legal owner, and the mortgage was a lien, it was nevertheless held in Massachusetts and in some other States that the mortgagee was, in accordance with the language of the deed, entitled to immediate possession even before breach, unless possession were reserved to the mortgagor. It is singular that courts which were prepared to ignore the language of a mortgage deed, in so far as it professed to divest the mortgagor of title, were not prepared to ignore it in the subsidiary matter of possession. In New York and other States the courts carried the doctrine that a mortgage was a pledge, to its logical results, and denied to the mortgagee the right of immediate possession. It is plain from the language of the early Massachusetts cases that the declaration by the courts of a right of immediate possession in the mortgagee was a surprise to the people of the State.

Within the last few decades a power of sale has very commonly been introduced into mortgages; some of the States control judicially the exercise of the power, and in all the States the power is subjected to the same equitable control which is exercised in general over matters of mortgage.

In view of the fact that a lien on land is a form of interest constantly recognized, familiarly understood, and capable of being clearly expressed, and that a lien voluntarily created by contract, for security, does not necessarily differ in this respect from the

¹ 8 Mass. 551.

familiar statute liens, why would it not be well to abolish by statute the present artificial and obscure forms of mortgage contract, the net result of the operation of which no one can define, and to provide for a return to a brief and simple deed of pledge, such as ingenuity has led us away from?

H. W. Chaplin.

BOSTON, March, 1890.

THE RIGHT OF ACCESS AND THE RIGHT TO WHARF OUT TO NAVIGABLE WATER.

THE right to wharf out to navigable water is unknown to the common law of England. The erection of a wharf upon public lands without the consent of the Crown is a purpresture.¹

There is, however, in the English law what is known as the riparian right of access, incident to lands bordering upon navigable waters. The celebrated case of *Lyon v. Fishmongers' Company*² has been understood to decide that this "right of access," like the riparian right to the appropriation and beneficial use of running water, is a "natural right," dependent solely on natural relations.³ The words of Lord Selborne in that case have been quoted as applicable to the right in question: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream."⁴

Lord Selborne said, with reference to this right: "The cases as to the alterations of the levels of public highways . . . seem to be authorities *a fortiori* . . . because they had not in them the element of a right *jure naturæ*."⁵

These decisions contain almost the only explanation thus far offered in the cases of the origin and nature of the English right of access, and this fact, together with the fact that most riparian rights are "natural rights," necessitates for the proper classifica-

¹ Gould on Waters, § 21, and authorities cited.

² 1 App. Cas. 662.

³ *Lake Superior Land Co. v. Emerson*, 38 Minn. 406.

⁴ 1 App. Cas. 682 (quoted in *Lake Superior Land Co. v. Emerson*, *supra*).

⁵ 1 App. Cas. 684 (quoted in *Lake Superior Land Co. v. Emerson*, *supra*).

tion of the right of access an analysis and discussion of natural rights.

I.

There are at least three well-recognized natural rights, — the right to support of land,¹ the right to unpolluted air, the right to running water.² These rights have often been called natural easements,³ from a mistaken notion that they are a benefit in or over the land of another, — the common attribute of easements. They are, however, nothing more than rights of property growing out of certain natural conditions of land, and the rights incident to any one parcel do not extend beyond the boundaries of that parcel.

The right of support is not a right to have the adjoining owner's soil *kept* in its natural condition, but a right to have one's own soil *left* in its natural condition;⁴ the right to unpolluted air is simply the right to have the air over one's own soil remain in its natural purity;⁵ the right to running water confers no right to control its course or use, either above or below one's own land, provided its natural course and condition upon⁶ one's own land remain unchanged.⁷

An interference with my natural rights is but an interference by another with the natural condition of my land. If, through the act of another, less water runs over my land than formerly, or if

¹ Lateral or subjacent. *Humphries v. Brogden*, 12 Q. B. 739.

² "It — namely, the right of support — is analogous to the flow of a natural river or of air." Per Willes, J., *Bonomi v. Backhouse, Ellis, B. & E.* 622, at p. 654.

³ "Natural rights are a species of easements." *Goddard on Easements* (Am. ed.), p. 3.

⁴ *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *Mears v. Dale*, 135 Mass. 508; *Mayor of Birmingham v. Allen*, 6 Ch. D. 284.

⁵ The plea in *Flight v. Thomas*, 10 A. & E. 590, that "for the full period of twenty years" defendant "had enjoyed the advantage of having and using a certain mixen in and upon the said premises," held insufficient to support a prescriptive right. Per Lord Denman, C. J. "The plea may be completely proved without establishing that right. The nuisance may never have passed beyond the limits of the defendant's own land."

⁶ Or *along*. "Lateral contact is as good *jure naturae* as vertical." Per Lord Selborne, *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, at p. 683.

⁷ "I apprehend that a proprietor may, without any illegality, build a mill-dam across a stream within his own property, and divert the water into a mill-lade, without asking leave of the proprietors above him, provided he builds it at a point so much below the lands of those proprietors as not to obstruct the flowing away of water as freely as it was wont; and without asking the leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land." Per Lord Blackburn, *Ewing v. Colquhoun*, 2 App. Cas. 839, at p. 856.

the air over my premises is polluted, or if the surface of my soil is changed, these natural conditions are altered, and, as a result, my natural rights are infringed. In other words, these rights are rights in one's own property, — *corporeal rights*.¹

Actual *damage*, in the sense of diminution of value for the uses to which the land is actually put, is not essential to the infringement of a natural right. Thus by the uniform current of decisions both in England² and America,³ it has been held that an action may be maintained for a violation of the right of support or of rights in running water, although the land is occupied for no beneficial purpose whatever.⁴

It has also been held that it is no justification for further pollutions that the water or air is already unfit for use.⁵

When the term "injury" or "actual injury" is used in the cases, it must be understood in its legal sense of "violation of a right," — the right being the absolute right of property already described.⁶

The true test of the infringement of this absolute right would seem to be, not whether there is damage, but whether there is such a disturbance of air, water, or soil as is perceptible to the ordinary man under the circumstances, — "such as can be shown by

¹ "The right to have a stream flow in its natural state without diminution or alteration is an incident of property in the land through which it passes." Per Parke, B., *Embrey v. Owen*, 6 Ex. 353, at p. 368.

² In *Orr Ewing v. Colquhoun* (2 App. Cas. 839, at p. 854), Lord Blackburn points out that the case of *Mason v. Hill* (3 B. & Ad. 304) settled the law that the proprietor of land on the bank of a natural stream above the flow of the tide has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the waters." Per Cave, J., *Ormerod v. Todmorden, etc., Co.*, 11 Q. B. D. 155, at p. 160.

³ "Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right, if no other damages are fit and proper to remunerate him." Per Story, J., *Webb v. Portland Manf. Co.*, 3 Sumn. 189, at p. 192.

⁴ *Parker v. Griswold*, 17 Conn. 288; *Miller v. Miller*, 9 Pa. St. 74; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Newhall v. Ireson*, 8 Cush. 595; *Franklin v. Pollard*, 6 So. Rep. (Ala.) 685. The same has been held in regard to pollution of the air, in *Dana v. Valentine*, 5 Met. 8; but see expressions *contra* in *Sturges v. Bridgeman*, 11 Ch. D. 852.

⁵ *Crossley v. Lightowler*, L. R. 2 Ch. 478.

⁶ "The pollution of a clear stream is to a riparian owner below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage." Per Fry, J., in *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. D. 769, at p. 772.

a plain witness to a plain common juryman."¹ "If, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual, as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation."² What would be a sensible disturbance to property situated in one place would be none to property situated in another, and a disturbance hitherto imperceptible may become perceptible when the land is used for a different purpose.³

Whether, when the purity of the air or the quantity of running water⁴ is in question, the law imposes an additional test, may be doubted; if so, it is done in the interests of public policy, and does not affect the nature of the right.

Several important consequences flow from considering these rights as corporeal. First, they cannot be *granted away*. These rights are rights against all the world, to prevent interference with property; and if they could be granted away, the only result would be that the grantee, having himself no rights over his grantor's land, would have the right to prevent others from interfering with its natural condition. The right to sue for a nuisance is no more severable than the right to sue for a trespass.

Secondly, they cannot be *destroyed*. Property cannot exist without the incidents annexed to it by law for its protection.

Thirdly, not being rights over the land of another, they cannot be *released*.

Fourthly, being corporeal rights, easements may be granted in them. The right to maintain a nuisance is in strictness a right in or over another's land, and is subject in every respect to the usual laws governing the origin, continuance, and destruction of easements.⁵

¹ Per James, L. J., in *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. 705, at p. 709.

² *Ibid.*

³ *Sturges v. Bridgeman*, 11 Ch. D. 852.

⁴ The English law would seem to give riparian owners an easement of *reasonable diminution* not granted to non-riparian proprietors. See *Ormerod v. Todmorden*, 11 Q. B. D. 155; but cf. *contra*, *Miller v. Miller*, 9 Pa. St. 74; *Wheatley v. Chrisman*, 24 Pa. St. 298.

There is no such easement of pollution, however. See *Blair v. Deakin*, W. N. (1887) 148.

⁵ "It—viz., the right to deprive land of support — was the grant of a right to disturb the soil from below and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a right of way over it." Per Lord Wensleydale, *Rowbotham v. Wilson*, 8 H. L. C. 348, at p. 362.

"There is no claim of an easement unless you make it appear that the offensive smells

II.

If the foregoing analysis of natural rights be correct, it follows, for two reasons, that the English right of access cannot be a natural right. First, it is not a right limited to land in its natural condition; it is not a right given by the law that the owner may preserve intact his own property, but it is a right over the land of another to get to a point where a public right may be exercised.¹

Secondly, the right of access cannot be a natural right, because it is not the result purely of natural conditions, but is dependent for its existence upon the existence of the public right before referred to. The public, including the riparian owner, having the right to navigate the stream, a private right distinct from the public right² is given the riparian owner, as owner, to enable him to get to navigable water, where he can exercise his public right.

The public right depends not upon the natural condition of the stream, whether it is *in fact* navigable, but rather upon whether the stream is *de jure* navigable,—whether, in other words, it is a public highway. The fact that in America streams *de facto* navigable are public highways only obscures the real question. The riparian right of access exists because the land to which it attaches abuts on a public highway, and the fact that the State has made the natural condition of the stream the test of the public right, cannot make the private right of access a natural right.

had been used for twenty years to go over to the plaintiff's land." Per Lord Denman, C. J., *Flight v. Thomas*, 10 A. & E. 590.

"The right of diverting water . . . is an easement." Per Cockburn, C. J., *Mason v. Shrewsbury Ry. Co.*, L. R. 6 Q. B. 578; 40 L. J., Q. B. 293.

¹ "This right of access would seem to include the right of landing in the ordinary manner and of passing over the soil of the bed of the river for that purpose, even where the soil is not in the Crown but in a private owner, as it is necessary for the full enjoyment of the right of navigation (*Rose v. Miles*, 4 M. & S. 101; remarks of Park, J., in *Duke of Newcastle v. Clark, Moore*, Rep. 666), and as the right of navigation exists at all states of the tide (*Mayor of Colchester v. Brooke*, Q. B. 639)." *Coulson & Forbes, Law of Waters*, p. 421.

² "The distinction between the right of access from the river to a riparian frontage, and the right of navigation when upon it, is more than once adverted to by the Lord Chancellor,—viz., in *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662,—who referred, certainly not with disapproval, to the judgment of Lord Hatherley, when Vice-Chancellor, in the case of *Attorney-General v. The Conservators of the Thames* (1 H. & M. 1), where that distinction is pointedly taken and acted upon." *Bell v. The Corporation of Quebec*, 41 L. T. Rep. N. S. 451, at p. 455.

The English right would seem, therefore, to be of the nature of an easement over the land of the State,¹ appurtenant to the upland, and strictly analogous both in origin and nature to that attaching to property bordering on highways by land.² The origin in the latter right is in the grant of the State at the time of the laying out or dedication of the street.³ The origin of the former right is similar. It is a mere right of way, which has been granted by implication to the original riparian owner because his land abuts on a natural highway. This easement of ingress and egress is appurtenant to the upland, and of course inseparable from it.

It remains to consider the nature of the American right to wharf out to navigable water.

III.

Where the title of the riparian owner extends *usque ad medium filum aquæ*, the nature of the so-called right to wharf out is of no importance, since the riparian owner may do whatever he pleases with his own soil, taking care not to obstruct navigation. It is only with reference to that class of cases where the riparian owner's title is said to terminate at high-water or low-water mark, that the nature of the right to wharf out becomes important.

The fee to the bed of tidal waters, to the bed of the Great Lakes, and to the beds of some of the large navigable rivers is held to be in the public.⁴ But while the riparian proprietor takes only to the water line, he has certain exclusive rights over or in the intervening space between his upland and navigable water. The following digest will indicate how far these rights, when not controlled by statute, have been the subject of decision in America.

In New York the riparian proprietor has no rights below high-water mark, the boundary line of his land.⁵

¹ When the title to the soil remains in the abutting owner, he is held to have reserved to himself all uses not inconsistent with a public right : (a) in case of highways by land, *St. Mary Newington v. Jacobs*, L. R. 7 Q. B. 47 ; (b) in case of waterways, *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166.

² *Bell v. The Corporation of Quebec*, 41 L. T. Rep. N. s. 451 ; *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713.

³ *Lahr v. Met. Ry. Co.*, 104 N. Y. 268, 288 ; *Adams v. C., B. & N. Ry. Co.*, 39 Minn. 286, 290-3, and cases cited.

⁴ Cases *infra* ; *Gould on Waters*, §§ 32, 82-84, and cases cited.

⁵ *Gould v. Hudson River R. Co.*, 6 N. Y. 522. (Certain rights are now given by statute. *Williams v. The Mayor*, 105 N. Y. 419.)

In Pennsylvania and Vermont he has a right of access to navigable water, but not a right to wharf out.¹

In Iowa, though a right of access is denied, a right to wharf out is recognized. Until the right to wharf out is exercised, it is not the subject of interference. It is called a franchise appurtenant to, and inseparable from, the upland, and when exercised, the State is probably divested of its title to the soil under the water.²

In New Jersey there is a wharfing-out privilege, — a mere license allowed by custom, and revocable by the State before being acted upon. When acted upon, the license becomes irrevocable.³

In Minnesota, Wisconsin, and the United States Supreme Court the right of access and the right to wharf out are both recognized, though apparently treated as one right.⁴ In Minnesota the right is called a natural right,⁵ and the court has thus far avoided passing upon the nature of the riparian proprietor's title to made lands between the upland and navigable water.⁶ The Wisconsin court has said that the right must be exercised in aid of navigation, and that, when so exercised, the structures built are "passively licensed by the State."⁷

In Connecticut there is a right to wharf out, or, as it is sometimes called, a right of reclamation. It is held to be a franchise, and that it may be sold apart from the upland.⁸ It has been called an "interest in the soil,"⁹ as well as an incorporeal right.¹⁰

¹ *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Austin v. Rutland R. R. Co.*, 45 Vt. 215.

² *Tomlin v. Dubuque R. Co.*, 32 Iowa, 106; *Musser v. Hershey*, 42 Iowa, 356.

³ *Gough v. Bell*, 23 N. J. L. 624; *Patterson v. Newark R. R. Co.*, 34 N. J. L. 532. (Now controlled by statute. *Hoboken Land Co. v. Mayor, etc.*, 36 N. J. L. 540.)

⁴ *Brisbine v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114; *Carli v. Stillwater Street R. R. & Transfer Co.*, 28 Minn. 373; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; *Hanford v. St. Paul & D. R. Co.*, 42 N. W. Rep. 596; *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214; *Diedrich v. Northern Ry. Co.*, 42 Wis. 248; *Lawson v. Furlong*, 50 Wis. 681; *Dutton v. Strong*, 1 Black, 25; *Railroad Co. v. Schurmeyer*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497.

⁵ *Lake Superior Land Co. v. Emerson*, *supra*. The definition in the Minnesota case of the right to wharf out is founded upon the case of *Lyons v. Fishmongers' Company*. There is nothing in the three opinions rendered in the latter case to justify such a citation, except the remarks of Lord Selborne upon the nature of the right of access. There is no intimation in either the opinion of Lord Cairns or Lord Chelmsford that the right of access is a natural right.

⁶ *Carli v. Stillwater Street R. R. & Transfer Co.*, 28 Minn. 373; *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297.

⁷ *Diedrich v. Northern Ry. Co.*, 42 Wis. 248; *Lawson v. Furlong*, 50 Wis. 681.

⁸ *Simons v. French*, 25 Conn. 346.

⁹ *Nichols v. Lewis*, 15 Conn. 137, 143.

¹⁰ *New Haven Steamboat Co. v. Sargent & Co.*, 50 Conn. 199, 203.

When embankments are made, the fee to the made land and submerged soil vests in the riparian owner, by the invocation of a doctrine that the principle of accretion applies as well to artificial deposits as to natural and imperceptible alluvion.¹ The title to wharves, and the right to transfer them apart from the upland, are assumed to be in the riparian owner.²

The right of access, or the right to wharf out, when recognized in these jurisdictions, and not a mere license, is a vested right of property, an interference with which must be followed by compensation.

The New Jersey and Iowa doctrine seems to be that the wharfing-out privilege is a license which, when acted upon, divests the State of its title to the submerged soil, on the Connecticut doctrine of accretion, or prevents the State from asserting its title on the principle of estoppel.

The English rule evidently prevails in Pennsylvania and Vermont. There is a right of access to navigable water which, as we have endeavored to show, is an easement of ingress and egress over public lands.

The decisions give color to three different views of the right to wharf out. (1.) That it is a license. (2.) That it is a permissible means of exercising or enjoying the right of access. (3.) That it is an independent right of property.

The first view is suggested by the Wisconsin court, where it says that if the building of a wharf furthers the public use, it is, in the absence of prohibition, "passively licensed by the public, and not a purpresture."³ But this statement seems to be inconsistent with the holding by the same court, that the right cannot be cut off by the State without compensation.⁴ If it is a license, there is no reason why it cannot be revoked before being acted upon.

The second view finds support in the Minnesota case,⁵ which relies upon *Lyon v. Fishmongers' Company*, and apparently treats the right to wharf out as being the same as the right of access. The objection to this view is that the term "right of access" is

¹ *Lockwood v. N. Y. & N. H. R. Co.*, 37 Conn. 387.

² *Simons v. French*, *supra*.

³ *Diedrich v. Northern Ry. Co.*, 42 Wis. 248.

⁴ *Delaplaine v. C. & N. W. Ry. Co.*, 42 Wis. 214.

⁵ *Lake Superior Land Co. v. Emerson*, 38 Minn. 406.

too narrow and limited to include such large means of exercise. The right to wharf out embraces many privileges which cannot be included in, and have nothing to do with, a mere right of way. It is a right to the exclusive occupation of the submerged soil between the upland and navigable water for docks, wharves, warehouses, coal and lumber yards, mills, and, in fact, for all purposes of the commerce marine.

Taking up the third view, we have already come to the conclusion that the right to wharf out is a right of property wholly independent of the right of access. The nature of the right only remains for consideration.

Starting with the general proposition that the right to wharf out cannot be cut off without making compensation, it must be conceded that it is something more than a license. It is not a natural right. It must be, then, either an easement, or an estate in the submerged soil resting upon an implied grant of the State. It is not unreasonable to assume a grant of this nature. The filling in of shallow water-fronts is conducive to the general welfare in that it is a necessary aid to navigation, and the riparian owner has peculiar advantages and special facilities for making such improvements. At any rate, the assumption of such a grant is a necessary premise to the holding that the right is a vested right of property.

Does this implied grant of the State convey an easement or an estate in the soil under the water? That it conveys an estate in the submerged soil to the line of navigability, and not an easement, is supported by the decisions which have construed express grants of a similar nature.

In a Maryland decision it was said that the right of making improvements on the water front "is a vested right, a *quasi* property, of which they (the riparian proprietors) cannot be lawfully deprived without their consent; and if any other person make such improvement without their authority, such person is a trespasser, and the improvement becomes the property of the owner of the adjacent land."¹

In a Virginia case the language of the court is: "This right of the riparian owner is not a mere license or privilege, but is prop-

¹ *Goodsell v. Lawson*, 42 Md. 348, 366. The Maryland statute reads as follows: "The proprietor of land on any of the navigable waters of this State is hereby entitled to the exclusive right of making improvements into the waters in front of his said land."

erty,— property in the soil up to the line of navigability, though covered by water; for the wharf, pier, or bulkhead can only be built on the soil. It is not a mere easement to pass over the water or a privilege to use the surface, but property in the soil under the water to which to fasten and build such structures; and for this purpose, and subject to the restriction that navigation shall not be obstructed, is as much property as the land above the margin of a navigable stream.”¹ The same effect has been given to a custom² and to a colony ordinance³ authorizing the building of wharves, where it was held that neither the custom nor the ordinance created a mere easement, but was a grant of the soil to low-water mark.

It is not a new doctrine that the right to the perpetual and exclusive use of land is equivalent to ownership, and not a mere easement. In an early English case⁴ a grant of the exclusive use of land, with a clause providing that the land itself was not demised, was held to be inconsistent in its terms; and in a New Jersey decision⁵ the court said that a grant of “the sole right, privilege, use, and enjoyment at all times for all purposes of fishing whatsoever, and for no other purpose,” conveyed an “actual estate, and not a mere license or easement.”

No good reason can be given for making a distinction between the right to wharf out which rests upon implied grant, and the same right created by express grant. In both cases the right is exclusive, and gives such use in, and control over, the submerged soil that it cannot be brought within any other class of rights than that of an actual estate in the land. The fact that the

¹ *Norfolk City v. Cooke*, 27 Gratt. 430. See also *Williams v. The Mayor*, 105 N. Y. 419; *Langdon v. The Mayor*, 93 N. Y. 129; *State of Illinois v. Ill. Cent. R. R. Co.*, 33 Fed. Rep. 731, 755 *et seq.*

The Virginia statute is as follows: “Any person owning land upon a water-course may erect a wharf on the same, or a pier or bulkhead in such water-course opposite his land, so that the navigation be not obstructed thereby.”

By reference to the Minnesota, Wisconsin, or United States Supreme Court decisions it will be seen that the Virginia statute gives precisely the same right as the common law.

² *Clement v. Burns*, 43 N. H. 609.

³ *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Alger*, 7 Cush. 77; *Brackett v. Persons Unknown*, 53 Me. 238; *Angell on Tide Waters* (2d ed.), 237.

But see *Thornton v. Grant*, 10 R. I. 477; *Providence Steam Engine Co. v. Providence Steamboat Co.*, 12 R. I. 348, 363.

⁴ *Burszord v. Capel*, 8 B. & C. 141.

⁵ *Fitzgerald v. Faunce*, 46 N. J. L. 536, 596-7. See also early cases cited in *Fitzgerald v. Faunce*.

public right of navigation is not abridged until wharves are erected does not require a holding that the fee to the submerged soil is not in the riparian proprietor.¹ The State, however, grants these lands for a particular purpose; namely, to further its commercial interests depending upon navigation. It is not unreasonable, therefore, to say that the grant is upon condition that the land be used for no other purposes than those of the commerce marine. If the property is used for any other purpose, the State should have the privilege of entering and determining the riparian proprietor's estate. Fees-simple with conditions attached that the land shall be used for a particular purpose are not uncommon, and in America such conditions are not in conflict with the rule against perpetuities.²

It has been suggested that the grant of the right to wharf out does not vest the title to the submerged soil in the riparian owner until wharves are erected.³ This theory is at once disposed of by the application of the rule against perpetuities. A grant of an estate in fee-simple which is not to take effect until some owner (present or future) of the upland builds wharves, *may not vest* the fee within twenty-one years after some life in being, and is, therefore, void.⁴

A very important practical result flows from holding the right to wharf out to be an estate in the submerged soil. It is only upon this theory that the right can be transferred apart from the upland. If it is a natural right, it is, of course, inseparable from the riparian estate. If it is an easement, it cannot be separated from the dominant tenement, for unless easements take the form of *profits à prendre* they cannot exist in gross. But if the express or implied grant by the State of the right to wharf out conveys the fee to the submerged soil to the line of navigability, the riparian proprietor's interest in the submerged soil may be severed from the upland and sold in parcels. The right of access is merged in the fee to the line of navigability though it may still exist beyond that point.

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DULUTH, MINN., March 15, 1890.

¹ *City of Boston v. Lecrow*, 17 How. 426; *Com. v. Alger*, 7 Cush. 53, 75; *State v. Wilson*, 42 Me. 9.

² *Gray on Perpetuities*, §§ 304-311.

³ *State of Illinois v. Ill. Cent. R.R. Co.*, 33 Fed. Rep. 731, 758-9.

⁴ *Gray on Perpetuities*, § 201 *et seq.*

DEFECTIVE ALIMONY DECREES IN MASSACHUSETTS.

IT not infrequently happens that alimony is granted upon a petition for divorce and alimony, in which there are allegations of cause for divorce only. The pleader inadvertently supposes that a petition so drawn is sufficient, the loose expression, "alimony is an incident to divorce," being led to an illogical conclusion. But certain cases have very recently come into being which, together, decide thus:—

1. A decree for alimony rendered at the termination of a suit for a divorce, in which there are allegations of cause for divorce, but no additional allegations of a cause for that alimony, in which there is only a prayer for alimony without corresponding allegations of the facts which, if proved, entitle the woman to the specific decree for alimony rendered, is void.

2. Such a decree for alimony is void, because it deprives the defendant of his property without a statute, which is unconstitutional, as divesting him of his property without "due process of law."

3. In a suit to determine the status of two persons (divorce), a court has no jurisdiction to decree property from one individual to another (alimony), without some allegations bringing that property into litigation. A decree (for alimony), under such circumstances, with such antecedents, is void, and may be impeached collaterally as having no legal foundations.

I.

Many an attorney in Massachusetts perhaps does not realize the collective result of the Massachusetts decisions on the subject of alimony and its proper allegations.

If the Massachusetts statutes, when taken together, authorized alimony to be decreed as a mere incident to divorce, and if alimony was the result of nothing else than a cause for divorce, then indeed only some statutory cause for divorce need be pleaded, and alimony prayed for on that.

But in *Graves v. Graves*,¹ the court said: "In making any order

¹ 108 Mass. 321.

respecting alimony, the court takes into consideration the property and capacity, or, in the phrase of the English ecclesiastical courts, the 'faculties' of the husband at the time."¹

This "property" or "capacity" to earn are then material facts. Must they be alleged?

In *Sparhawk v. Sparhawk*,² the court held that an alimony decree must be "warranted by the allegations of the bill or petition," and cited *Mason v. Daly*³ as the controlling authority. But this is an equity case. It cites *Stanley v. Stark*,⁴ also an equity case, which cites in turn *Smith v. Townsend*,⁵ still another case in equity. The principle as to pleading material facts which is enounced in this last case, and which thus runs by successive citations into the alimony case of *Sparhawk v. Sparhawk*, is as follows: "Upon this appeal there is nothing before the full court except the question whether the final decree is supported by the pleadings in the case. It may be true that the evidence produced at the hearing fully sustained the decree, and yet it is open to the defendant to claim that upon the allegations in the bill the plaintiffs, as matter of law, are not entitled to the relief awarded."⁶

This chain of citations abundantly demonstrates that equity law applies to a bill that asks alimony, and to the decree that is founded upon its allegations.⁷

¹ "The defendant husband being left entirely without property, no decree for alimony can be rendered against him, alimony being an allowance out of the *husband's estate* for the support of the wife. Where there is no estate, there can be no alimony." *Feigley v. Feigley*, 7 Md. 563.

² 120 Mass. 390.

³ 117 Mass. 403.

⁴ 115 Mass. 259.

⁵ 109 Mass. 500.

⁶ *Slack v. Black*, 109 Mass. 499. "Except in cases where express exceptions have been made, the laws regulating the practice in the court of chancery apply in cases of divorce." *Fulton v. Fulton*, 36 Miss. 517, 520.

⁷ See also *Crockett v. Lee*, 7 Wheat. 522, p. 525: "No rule is better settled than that the decree must conform to the allegations as well as to the proofs of the cause. If it be void in itself, no testimony can sustain it. The counsel say, it would be monstrous, if, after the parties have gone to trial and directed all their testimony to a certain point, their rights should be made to depend, in the appellate court, on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case. The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and closest principles of general utility."

"If the pleadings of a cause were to give no notice to the parties or to the court of the material facts in which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof differing from that stated in the pleadings, all will perceive

The complex and nature of a suit for divorce and for alimony will be suggested from the following cases: —

*Gould v. Crow.*¹ “A *divorce* suit is a proceeding *in rem*. The status of the husband is the *res* to be acted on and dissolved by the decree. The decree so pronounced is a judgment *in rem*; but such judgments can only have effect upon the thing acted on by the decree, and such rights as are dependent on that for existence. Therefore, if a court, in severing the marriage tie, undertakes to render a decree *in personam* as to alimony, *it can have no extra-territorial effect.*” In this case there was no personal service upon the husband, which gave the court opportunity to show that judgment for divorce and for alimony proceeded on distinct grounds — that one could stand where the other could not. The allegations and circumstances authorizing the one are not identical with those authorizing the other.

*Lytle v. Lytle.*² “In divorce cases, no more than in any other, can the court render a decree for the payment of money by a defendant not personally served. The remedy for the complainant must, in these cases, be confined to the dissolution of the marriage tie, with the incidental benefits springing therefrom, and to an order for the custody of the children,” — thus distinguishing between what is really “incidental” to divorce, from alimony, which is a possible but not invariable consequence of a number of facts of which divorce is only one.

*Ellison v. Martin.*³ Action on an alimony claim. In the divorce suit there had been a prayer for alimony with allegations for divorce, judgment by default for \$200 alimony, execution on husband's land, sheriff's sale and deed. By the court: “In her petition for divorce she alleged that her husband owned eighty

the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts.”

A Massachusetts jurist adds (Story's Eq. Pl., § 257): “*Every fact essential to the plaintiff's title to maintain the bill and obtain the relief, must be stated* in the bill, otherwise the defect will be fatal.” See also *Johnson v. Johnson*, 4 Wis. 140.

Fulton v. Fulton, 36 Miss. 517, 520. “The decree of a court of equity upon oral allegations would be an idle act, if no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way.” *Windsor v. McVeigh*, 93 U. S. 283.

Mere testimony as to the husband's means, without any pleadings concerning such duly served upon him, is equivalent to “oral allegations.”

¹ 57 Mo. 203.

² 48 Ind. 200, at p. 202.

³ 53 Mo. p. 577.

acres of land, but did not describe the land or its value. The plaintiff stood alone on the sheriff's deed. If the judgment for alimony was void, the sheriff's deed was also void.

"A divorce suit is a proceeding *in rem*, and the *res* is the status of the plaintiff in relation to the defendant, to be acted on by the court. There was nothing before the court to act on in regard to alimony in this case."

Thus, "an action for divorce and alimony" is really a combination of two differing suits. One suit is *in rem*, to change the status of the plaintiff, *i. e.*, for divorce. The other suit, joined with it, is *in personam*, for money, alimony. These suits are quite distinct in principle, and proceed on different grounds. Or, rather, the suit for divorce simply is founded on the court's statutory right to grant it, when a statutory cause for divorce is alleged and apparently proved; while the suit for alimony is founded on that, and something else besides.¹

The subject will be made clearer by assuming a hypothetical case and a specified decree. Suppose a Mrs. Roe alleges "cruelty," with its specifications, and obtains on that alone a decree, say, of \$1,200 yearly income. Does the mere allegation and proof of "cruelty" give her the right to \$1,200 alimony per year? or the right to have the court grant such?²

Mrs. Roe's petition scantly alleges domicil and a statutory cause for release from her marriage vows, but no more. That renders the suit for divorce, indeed, complete. But there is no suit for alimony intertwined with that, except that incomplete portion of it,—the prayer for alimony. Does that state the title to \$1,200 per year? Is all that is necessary to get that a perfectly general prayer, with not a solitary fact to cling to?

In *Bushnell v. Avery*³ the court said: "No such condition of facts is set forth as entitles the plaintiff to the relief prayed for. . . . The stating part of the bill cannot be enlarged by the terms of the prayer for relief."⁴

¹ "Probable cause for the suit, the wife's necessity, and the husband's ability, are the controlling considerations in determining whether the alimony and suit money will be allowed." *Burgess v. Burgess*, 25 Ill. App. 526.

² "In England alimony is made the subject of a special application or petition, separate and distinct from the libel for divorce. But we think ours is the better practice, in that it accords with the analogies of equity procedure, by including in the same bill all the allegations of fact upon which it may be necessary for the court to adjudicate for the purpose of a complete determination of all matters involved in this action." *Damon v. Damon*, 28 Wis. 514.

³ 121 Mass. 148.

⁴ See also *Belle v. Merrifield*, 109 N. Y. 202.

If upon cruelty alone being alleged Mrs. Roe has a right to \$1,200 a year in alimony, then every pauper's wife, every poor washerwoman or ragpicker, has a right to ask for \$1,200 a year as soon as cruelty in the husband is alleged and (apparently) proved in a mere divorce suit.

"The alleged marriage and faculty of the defendant, that is, his ability to pay such sums as may be decreed, must be admitted or proved before alimony can be awarded. (Bishop on M. & D., Vol. 2, Sec. 496) . . . p. 250. "The amount of property owned by the defendant was a material averment in the bill, and material in the bearing of the question as to alimony. . . . It is a well-established doctrine that the facts upon which a decree is based must appear somewhere in the record."¹ Thus the right to alimony and the jurisdiction of the court to determine it is founded upon the husband's *alleged* ability to pay it—his ability to support a wife. It depends upon either his accumulated means, his income, or his capacity to earn, as alleged.

Unless these exist to the extent at least of \$1,200 a year, the court has no right to grant that amount of alimony;² and the jurisdiction of the court, the power to exercise that right, the power to hear and determine, depends upon whether there is something to hear and something to determine; *i. e.*, whether there is a suit for \$1,200; not only a suit for simple divorce, but a suit for that alimony, which must consist of written allegations (combined with those purely for divorce), that the husband's wealth, income, or earning ability is at least \$1,200 a year.³

¹ Becker *v.* Becker, 15 Ill. App. (Bradwell), p. 249.

² Park *v.* Park, 80 N. Y. 160: "It does not appear that the judgment (for alimony) exceeded the demands of the complaint (for divorce and alimony). The proper course, if the judgment was wrong in this respect, would be to vacate or modify the same."

³ Remington *v.* Sup. Ct., 69 Cal. p. 633. Divorce and application for a writ of prohibition: "The issue in the divorce suit did not embrace the disposition of property. In an action for divorce, if a disposition of property is sought, there should be some pleading by which an issue as to such property would be tendered. It appearing in this cause that no such issue was tendered, the court had no jurisdiction to make the restraining order."

Jordan *v.* Jordan, 53 Mich. 552. Divorce. Held: "The bill of complaint says nothing in regard to alimony. There was nothing in the pleadings . . . to which the subject-matter of alimony was germane, or upon which the relief sought could be based. The court had *no power* to grant relief."

Clayton *v.* Clayton, 1 Ashm. (Pa.) 53: "Not a word is said in the libel about alimony. There was nothing in the pleadings . . . to which the subject-matter of the motion for alimony was germane, or upon which the relief sought could be based. Complainants of every description must recover *secundum allegata et probata*, and if we

The allegations of such fact without their proof would be futile. Certainly it seems the proof of them without allegations is equally so. Mrs. Roe does not allege *title* to \$1,200 alimony; she consequently is unable to prove it. That the court has no right to listen to any evidence of what alimony she might otherwise deserve, and, therefore, no right to grant any decree for it, is lucidly shown in *Bamford v. Bamford*.¹

"The complaint in the divorce suit contained no allegations in regard to property." Held, p. 36: "To enable the court to act judicially on the subject of property, it must appear in the complaint that the party has property, otherwise, there being nothing alleged, there is nothing to determine in respect to property, and nothing before the court on which to base a decree in this particular. *If nothing is stated concerning property, it can hardly be deemed a case concerning it.* . . . The contrary construction would require the court to decree concerning that which does not exist. The plaintiff has not acquired a legal or equitable right to the property by the decree of divorce [*i. e.*, the decree is a nullity]. The court may first pass upon the question of granting or denying the divorce, and afterwards, in the same suit, investigate and determine the issue concerning property. . . . The plaintiff had a right in her complaint to make an exhibit of her husband's pecuniary condition in order to lay a foundation for alimony."²

The decree for money in a divorce suit may be likened to the

depart from this salutary rule, we cannot foresee the inconvenience which might arise. We are ready to decree a divorce, but no other."

Cassidy v. Cassidy, 63 Cal. 352. Divorce: "It is well settled that the findings in a divorce case must respond to all the material issues made by the pleadings."

Porterfield v. Butler, 47 Miss. 170: "A judgment without issue joined is a *nullity*. The pleading in a case must evoke an issue of law or of fact before a judgment can be rendered. Judgments without issues to be determined by them are nullities."

Ulrich v. Ulrich, 4 Pa. County Ct. 133. Divorce: "Respondent cannot even be compelled to pay costs in divorce when there is no allegation that he was able to pay and he denied his ability."

¹ 4 Or. 30.

² *Spoor v. Coen*, 44 O. St. 502: "To bring a cause before a court competent to adjudicate upon it, it is not only necessary that the parties be cited or summoned in the manner required by the law of procedure, but a case must be made or stated, affecting the party against whom relief is asked. A judgment rendered where no case has been stated is as much a judgment upon a case *coram non judice*, whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it."

Milner v. Shipley, 94 Mo. 109: "The court had *no jurisdiction* to render a judgment against property different from that described in the petition. . . . The judgment is therefore void and open to collateral attack."

judgment for money in a damage suit. In the divorce suit the wife claims that she is damaged, as it were, by the enforced loss of her husband's support, through his fault, to the extent of the support the husband could or should give her, did she remain a wife. These are her damages and her alimony. Where no damages are alleged, where is the court that has jurisdiction to grant any?¹

The decision of *Crocket v. Lee* (*supra*, p. 26, note) was followed years after by a much-quoted and all-important case, in which the supreme tribunal of the nation lays down the following principles: ²—

"It is an essential ingredient in every case that there should be proper judicial proceedings upon which to found the decree; that is, that there should be certain written allegations, or statements of the charge for which the seizure is made, and upon which the forfeiture" [of the husband's property] "is sought to be enforced. If condemnation is made without any specific cause of forfeiture" [the specified amount of financial loss incurred by the wife because of her enforced divorce from a wealthy husband], "the sentence is not so much a judicial sentence as an arbitrary sovereign edict.

P. 281. "Such sentences are mere mockeries, in no just sense judicial findings; they ought to be condemned both *ex directo* and *collaterally*, as mere arbitrary edicts and substantial frauds.

P. 282. "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in the extent . . . of its judgments" (which cannot extend beyond the limit of the allegations of damages or alimony named by the wife).

P. 283. "A departure from established modes of procedure will often render the judgment *void*. The decree of a court upon oral allegations, without written pleadings (if that on which the decree is based), would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor."

Is the respondent entitled to no notice of the extent to which he may be entitled — no notice of the outside *limit* of the damages charged upon him — until the decree is an accomplished fact?³

¹ *Velvin v. Hall*, 78 Ga. 139: "It is the amount of damages laid in the declaration that fixes the jurisdiction."

² *Windsor v. McVeigh*, 93 U. S. p. 280.

³ *Howe v. Howe*, 4 Rev. 469. Divorce Appeal from alimony. Held: "It is claimed that the court erred in awarding alimony to Mrs. Howe. In a proper case the court would have such power. *Here*, no such issue was presented. The pleadings say nothing

To decree a sum of money (alimony) from one individual to another, without written pleadings, duly served, in a lawful suit, "according to the law of the land," is simply a forfeiture and confiscation of property.¹ A criminal can know, from the penal codes, to what extent he may be fined for some forbidden act. But the penalty for an act forbidden by divorce law, in a suit often termed "*quasi* criminal," is limitless, if none need be alleged. The tendency of American constitutions is to repress anything like confiscation, attainer, forfeiture. Is there no limit to the forfeiture of property that the unfortunate husband may suffer when cause for divorce is apparently made out by a woman seeking release from her marriage vows?

The true husband may have had good and proper reason for wishing to surrender a wife recently unworthy, and for being unwilling to resist a simple action for divorce. Is he liable, if he is silent, if he refuses to answer only to that extent — the extent of the divorce charges — to have his entire property swept from him, perhaps, by a hasty decree, in his absence, without notice of the calamity until it has happened?

Let us assume that she swears, with her easy readiness, that her husband is "worth a million dollars," and orally asks a decree for \$500,000. Is she not as equally entitled to it, under the hypothetical libel, as to a decree for \$1,200? Allegations of amounts, figures, boundaries, limits, are all totally wanting here.

The wife is not the only one who has rights in a divorce suit. It was she who voluntarily brought it. If any confusion grows out of her illegal pleading, upon whom must the hardship rest? Upon the one who seeks relief from the burdens of a lawless decree, or upon the unmarried individual, of full age, who yet wants some one else to support her; who has sought exemption from the duties of a wife, and yet the retention of a wife's full financial privileges; who seeks it upon a decree obtained without notice, and from a man who may have a lawful wife and

upon the question of property. The appellant might well have believed from the complaint that no such case was made. Decree reversed, so far as it purports to make disposition of, or concerning, property."

Sanchez v. Sanchez, 21 Fla. 346: "An order for alimony . . . where it does not appear by the record that the husband was *duly* notified, will be set aside as void."

¹ *Brooks v. Aubury*, 7 Or. 464; *Taylor v. Porter*, 4 Hill, 146; *Fisher v. McGin*, 1 Gray, 32; *Burr v. Burr*, 7 Hill, 231; *Dartmouth College v. Woodward*, 4 Wheat. 519; *Cooley on Const. Limitations*, pp. 432, 437.

children to provide for? To whom should the consideration, if any, be shown?

The husband has a right to rely on the belief that his property will not be taken from him except "according to the law of the land," and to absent himself, if he sees fit, from the hearing of a suit that in legal reality only asks a divorce. He may rely on the belief that under a prayer for alimony, with no allegations of that which gives right to it, the court will act lawfully.

In *Bender v. Bender*,¹ a suit for divorce and alimony, the grounds for alimony as alleged in the pleadings of the case were different from those recited in the decree. Held: —

"The plaintiff made one case in her pleadings, and has succeeded in obtaining an (alimony) decree in another and different state of facts. 'The maxim that the decree must be *secundum allegata*, as well as *secundum probata*,' says Chief Justice Marshall in *Schooner Hoppett v. U. S.*,² 'is essential to the due administration of justice in all courts.' The rule is founded in sound reason and good sense, and it requires that a party must obtain a decree on the grounds stated in the pleadings, and that the proofs must tend to establish the material allegation therein, and its observance by the court is absolutely essential to the due administration of justice." Decree for alimony reversed.

If, in the opinion of any, it is improper in the man to refuse to resist separation from a wife who wants to get rid of him, surely the penalty is not without limit. He still has some remaining rights as to his own property, which it is the court's duty to maintain.³

Where, in the record of the whole divorce suit, are those allegations which bring the subject-matter of alimony, to the extent of the decree, within the jurisdiction of the court?

In *Cummings v. Cummings*,⁴ a suit for divorce and alimony, it was held (p. 440): —

"The portions of the decree as to alimony must be reversed; they are not based upon any pleading in the cause. P. 441: The relief which the court below attempted to grant plaintiff was neither consistent with the case made by the complaint nor embraced within the issues made by the answer. In *Gregory v. Nelson* (41 Cal. 278) it was held that if a judgment in equity deems the existence of any facts not within

¹ 14 Or. 355.

² 7 Cranch, 389.

³ *Hinkley v. Machine*, 15 N. J. L. (3 Greene) 476. "A court, by a rule of practice, cannot alter the law."

⁴ 75 Cal. 435.

any issues made or tendered by the pleadings, and then pronounces the judgment of the court upon such facts, *such part of the judgment is superfluous and nugatory*. See also 33 Cal. 474. A judgment for the plaintiff must be limited by the facts stated in the complaint. When the defendant has answered, the court may, under the general prayer, grant any relief consistent with the facts alleged in the complaint, but under the general prayer no relief can be granted in equity beyond that which is authorized by the facts stated in the pleadings.”¹

II.

The Massachusetts statutes empower Massachusetts courts to decree alimony only “according to the *course of proceeding* in ecclesiastical courts and in courts of equity.”²

In Lovett *v.* Lovett,³ the Supreme Court of Alabama says: “The mode of proceeding in the ecclesiastical courts to obtain alimony is by an allegation of the ‘faculties,’ as it has been called, on the part of the wife, setting out the estate of the husband.”⁴

George F. Ormsby.

NEW YORK.

¹ Davol *v.* Davol, 13 Mass. 264. An unauthorized alimony decree is not voidable, but void.

Com. *v.* Blood, 97 Mass. 539. Divorce courts are, as to divorce matters, courts of limited and inferior jurisdiction.

Runge *v.* Franklin, Texas, 1889, 3 Law R. Ann. 417.

² Pub. Stat. c. 146, s. 33. ³ 11 Ala. 771.

⁴ Windsor *v.* McVeigh, 93 U. S. 283: “A departure from *established modes of procedure* will often render the judgment *void*. The decree of a court upon oral allegations, without written pleadings [if that on which the decree is based], would be an idle act of no force. . . . Though the court may possess jurisdiction of a cause and of the parties, it is still limited in its modes of procedure.”

Pennoyer *v.* Neff, 95 U. S. 733: “Due process of law means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”

Also, Weber *v.* Weber, 16 Or. 163; Bunnell *v.* Bunnell, 25 Fed. Rep. 214; Anthony *v.* Kasey, 83 Va. 338; Wright *v.* Dann, 22 Pick. 59; Stewart on M. & D., § 361; Bishop on M. & D., 2d vol., 6th ed., 467; 75 Pa. St. 460; Barber *v.* Root, 10 Mass. 265; Lowe *v.* Alexander, 15 Cal. 297; Orrick *v.* Orrick, 1 Mass. 341; Gaiquon *v.* Aster, 2 How. 341; Thatcher *v.* Powell, 6 Wheat. 119; 34 Cal. 333; 23 La. An. 483; Beadleston *v.* Beadleston, 103 N. Y. 404; Bishop on M. & D., § 446, 447; Phelan *v.* Phelan, 12 Fla. 449; Campbell *v.* Campbell, 37 Wis. 208; Hoke *v.* Henderson, 25 Am. Dec. 681 (4 Devereux, Law, 1); Murray *v.* Hoboken, 18 How. 272; Rees *v.* City of Watertown, 19 Wall. 122; Huber *v.* Reilly, 53 Penn. St. 118; Freeman on Judgments, § 587.

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WITH the present number the HARVARD LAW REVIEW begins the fourth year of its existence. Reassured by the success of the past three years, and by the manifest good-will and hearty encouragement of the friends and alumni of the School, the editors feel that the REVIEW is rapidly outgrowing the experimental stage of its life; and are led to believe more and more strongly that it has a place to fill as the organ of the characteristic work of the Harvard Law School. The ever-increasing success and influence of that work should be, and we believe are, matters of deep interest among the advocates of that system, and to spread more widely its best results is the first aim and purpose of the REVIEW. To this end we ask the continued support and co-operation of all friends of the School, and more especially of the members of the Harvard Law School Association.

The general plan of the REVIEW will be the same as in previous years, and about the same relative proportions will be preserved between the several departments. The high standard of excellence which the leading articles have shown, leave little room for apprehension in that direction; especial pains will be taken to make the Notes as interesting, and the Recent Cases as exhaustive, on all important points, as possible. We trust that the results of our endeavors in the future may show as steady an advance of the REVIEW in legal favor as have those of former editorial boards.

WE have heard with great regret of the resignation of Professor William A. Keener to accept a chair at the Columbia Law School. Professor Keener graduated at the Harvard Law School in 1877; in 1883 he was appointed assistant professor for five years, and at the end of this term, in 1888, he accepted the Story professorship. The students who have attended the School during the past seven years will not easily forget his unvarying kindness, his clear and suggestive method of teaching, and the interest and enthusiasm for his subject

which he always aroused in his classes. His departure must be felt with regret by all who have the interest of the School at heart, and to this is added a sense of personal loss among those who had hoped to have the benefit of his further instruction.

THE recent cases on "trusts" suggest, among other more important things, the question whether it is material that the subject-matter of the "trust agreement" be an article of necessity. In the case of the *People v. The North River Sugar Refining Co.*,¹ some twenty cases are cited, and the result summed up in the following sentence: "In all these cases, the reservation of the power to control the prices of necessary products, whether by express agreement or fair implication, has been condemned as unlawful." In *Dolph v. Troy Laundry Co.*,² moreover, one of the reasons for holding a contract between two rival traders fixing a scale of prices, legitimate, was that washing-machines are not articles of necessity.³

In discussing the differences between a monopoly of a necessary and that of a non-necessary (if we may be allowed such a term), one must look at the question both from the side of the monopolist and from that of the public. Of course, the object of a monopolist is to raise prices, and thus enrich himself at the expense of the public. Now, it is undoubtedly true that, as prices are raised in the two cases we are considering, the quantity of the non-necessary demanded by the public will fall off much more rapidly than that of the necessary. In other words, a man cannot make so much money out of the former, because his sales must be more limited than would be the result in case of an equal rise in the price of the latter. Therefore, the monopolist cannot gain so much at the expense of the public; but does it follow that the public's real loss is less by the same amount that the monopolist's gain is less?

We must not forget that the man who ceases to buy an article because of the rise in price, or one who does not buy so much as he did at the lower price set by competition, suffers a loss as well as the man who buys the same amount as before but at a higher price. In the case of the non-necessary, more people prefer to take the loss by going without the article than in the case of the necessary; that is, the same proportion of the loss does not materialize in the form of gain to the monopolist in the former as in the latter case.

We do not mean to imply that the loss is as hard to bear in the one case as in the other, or that it will be to the interest of the monopolist to raise prices to the same extent in both cases; but we do wish to point out that there is injustice to the public in the one case as in the other, and that the ordinary method of measuring the amount of the injustice by the amount of the monopolist's gain has a tendency slightly to exaggerate the difference in hardship to the public between the two kinds of monopoly. No doubt there is a difference, but it is a difference merely in degree.

Turning to the reports, we find that in *The Case of the Monopolies*,

¹ 7 N. Y. Sup. 406, at pp. 412, 413.

² 28 Fed. Rep. 553.

³ It was also held that the contract fell short of an attempt to create a monopoly, a ground which of itself would seem sufficient to support the decision entirely irrespective of the question of necessity.

⁴ 11 Coke, 84.

a monopoly of the manufacture and sale of playing-cards, granted to an individual by Queen Elizabeth, was held void at common law. There would seem to be no reason for drawing a distinction on this point between a monopoly granted by the State and one acquired by an individual or group of individuals. Moreover, the maxim "Competition is the life of trade" (a maxim which seems to measure with some degree of accuracy the extent to which the law takes notice of political economy), undoubtedly covers the manufacture and sale both of necessaries and non-necessaries.

Upon the whole, it is much to be doubted whether the decision in the New York case would have been different if the "trust" had been for the manufacture of playing-cards instead of the refining of sugar. The particular case before the court was the monopoly of an article of necessity, and we must conclude that only the cautious habit of not deciding more than needful for the disposition of the case in hand led the court apparently to lay down what would seem to be an unnecessary limitation.

GOVERNOR HILL's recent message to the New York Legislature, suggesting that the opinion of the Court of Appeals be taken on the constitutionality of the Saxton Ballot Reform bill is interesting. Washington made a similar attempt to get the opinion of the Supreme Court of the United States in 1793, but the judges refused, regarding the task of answering such questions as not within the scope of their judicial duties.¹ It is not improbable that this example would have been followed by the Court of Appeals, if the Legislature had acceded to Governor Hill's request. Such an interpretation of the court's duties would seem at least to be the correct one, in the absence of constitutional provisions, such as exist in Massachusetts and some other States, requiring opinions from the judges.

In this connection the action of the Supreme Court of Minnesota in 1865² is worth noticing. Questions were put to that court by the senate, under a statute making it the duty of the judges to answer in such a case at the request of either house. The court, however, declined to give an opinion, on the ground that the statute was unconstitutional as imposing duties not properly judicial or to be performed in a judicial manner, and that it would be improper to answer voluntarily. Similar statutes calling for advisory opinions from the judges may be found in Vermont³ and—in a limited class of cases—in New York.⁴ Governor Hill mentions as precedents for the action which he recommends, the former Council of Revision in New York, and an opinion given by the Court of Appeal in 1872. The circumstances of the latter case do not appear; but the Council of Revision was established by the Constitution,⁵ and is therefore no precedent for a voluntary answer. An instance of such an answer by the Supreme Court of New York in 1846 may, however, be found in the Debates in the Massachusetts Convention of 1853.⁶

¹ Marshall's Life of Washington (Am. ed.), v. 441. See a "Memorandum on the Legal Effect of Opinions given by Judges," by Professor Thayer.

² *In the matter of the Application of the Senate*, 10 Minn. 78. See supplementary note to Professor Thayer's pamphlet.

³ Revised Laws of Vermont, 1880, s. 795.

⁴ Revised Statutes, part iv. tit. 1, s. 14; see *People v. Green*, 1 Den. 614. For an opinion based on a similar statute in Pennsylvania, see *Report of the Judges*, 3 Binney, 598 (1808).

⁵ Const. of 1777, iii.

⁶ I. 138; also in Jameson's Constitutional Conventions, App., 663.

IN the case of *Brennan v. Brighton Beach Racing Association*,¹ the General Term of the New York Supreme Court has just decided that a person who buys a pool ticket on a race-course can enforce the contract at law.

The plaintiff in this case had bought twenty pool tickets on a certain horse, which proved to be a winner. He demanded his winnings, amounting to about \$750, from the seller of the pool, who, for some reason, refused to pay. Brennan thereupon brought suit to enforce payment. In the lower court the judge dismissed the suit, on the ground that the contract being a gambling transaction was void. Against this decision the plaintiff appealed, with the result above stated.

The decision is based on the so-called Ives' pool bill, which was passed in 1887. The court says, that before that time the transaction would have been unlawful; but the law then passed, among other provisions, regulates the times and places at which pools may be sold during the racing season. From this it appears that the Legislature intended to legalize such sales. "They are neither forbidden nor condemned, but they are regulated. There would have been no sense nor reason in declaring that pool-selling should be confined within the period mentioned, and to the places designated, unless it was intended to sanction the right of the association to make such sales."

We cannot agree with some of the daily papers that by this decision the court have given an effect to the law which is opposed to the intention of the Legislature which passed it. Section four of the law provides for the suspension of sections 351 and 352 of the Penal Code during the days on which racing is authorized, and, also, "that pool-selling shall be confined to the tracks where the racing takes place, and to the days of the races." At other times and places pool-selling shall be severely punished. The suspended sections of the Penal Code make it a crime to sell pools, or in any way to aid in betting, or to race a horse for money. The only reasonable interpretation of these provisions is, that, at the times and places mentioned, pool-selling is to be lawful. In the case before us the pool tickets represented a contract which is good in substance, but which the courts have refused to enforce, as being contrary to law. The Legislature expressly says that at certain times and places such a contract shall no longer be contrary to law. On what ground, then, can the court refuse to enforce it? Under the law as framed it would seem that no other decision could well have been reached.

THE following paragraph appears in the "Law Quarterly" for January:² "It is to be regretted that so eminent a judge as Fry, L. J., should be reported as calling the citation of American authorities 'waste of time.' (*Re Missouri Steamship Co.*, 42 Ch. Div. 330.)"

¹ See the "New York Herald" of March 15, 1890.

² Vol. 6, p. 122.

Lord Halsbury (interrupting counsel): "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own courts, is wrong. Among other things it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own." Fry, L. J.: "I also have been struck by the waste of time occasioned by the growing practice of citing American authorities." Cotton, L. J.: "I have often protested against the citation of American authorities."

If they are irrelevant, or mere repetition of what is already in English authorities, the citation of them is of course a waste of time; so is the citation of irrelevant English authorities; but if they are relevant, they may be of the highest value, not only for the intrinsic excellence of the judgments, monuments often of industry, learning, and genius, but as independent commentaries on the principles of the English common law or equity developing under new conditions among a 'noble and puissant nation.' Lord Halsbury was of course quite right in declining to receive them as of equal authority with the decisions of our own courts; but this is no disparagement to their juristic excellence, which, for the rest, has been many times acknowledged from the bench in reported judgments and dicta."

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

FORBEARANCE TO SUE AS CONSIDERATION FOR A PROMISE. — (*From Prof. Keener's Lectures.*) — The essence of consideration is detriment to the plaintiff. The plaintiff has suffered detriment when he has *given up a right*. Therefore, whenever one has a *right* to sue, forbearance is a good consideration.

Now, when does one have a *right* to sue? There are three possible views.

(a) One view is that a man can invoke the aid of the law only when he has a good cause of action. He has no right to come into court unless he can succeed. The province of the court is simply to protect rights.

(b) The second theory gives a man a right to appear when the case is really doubtful, either in law or in fact. He can come into court and find out the truth of the matter. The court is an arbitrator to settle differences.

(c) A third idea is that any man can appear in court who *honestly believes* that he has a cause of action. The court is bound to give a hearing to every man who appears *bona fide*.

Historically the first view is correct. For a party coming into court has to succeed or pay costs. Costs are regarded as compensation for the wrong done to the opposite party in invoking the aid of the law against him without any good cause of action. And in early times a defeated suitor had to pay a fine to the king in addition to the costs of the action.¹

The third view, however, is that on which the English courts act.² *Callisher v. Bischoffsheim*³ stands in England to-day for the proposi-

¹ Bacon, Abr., title Fines and Amerciaments, c; *Beecher's Case*, 8 Coke, 61.

² *Miles v. New Zealand Co.*, 32 Ch. Div. 266.

³ L. R. 5 Q. B. 449.

tion that a party has a right to sue when he *believes* that he has a good cause of action. It is enough if the plaintiff can establish that at the defendant's request he forbore to prosecute a claim which he *believed* was well founded. And it is no answer to show that the claim was not well founded, or was not even reasonably doubtful.

Probably the second view is nearer the law in America.¹ It would be safest in this country for the plaintiff to allege that he forbore the prosecution of a claim which was reasonably doubtful. The second view is also the most convenient from the standpoint of public policy.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

COMMON CARRIERS — CONTRIBUTORY NEGLIGENCE. — A man desiring to ship stock, knew that the only platform provided by the railroad company for that purpose was defective. *Held*, that he was not guilty of contributory negligence in using it, provided there was no carelessness on his own part. A public duty rests upon the company to provide suitable platforms, and it cannot evade its liability because of the knowledge of the plaintiff. *White v. Cincinnati Railway Co.*, 12 S. W. Rep. 936 (Ky.).

COMMON CARRIERS — LIMITING LIABILITY. — The plaintiff shipped horses under an agreement limiting the liability of the carrier to cases of negligence, and restricting the damages to one hundred dollars for each horse. By so doing he obtained reduced rates. *Held*, the contract was valid, and the plaintiff should not have been allowed to show that the horses were in fact worth more. *Richmond & Danville R. Co. v. Payne*, 10 S. E. Rep. 749 (Va.).

COMMON CARRIERS — LIMITING LIABILITY — FREE PASSES. — An agreement, by one accepting as a gratuity a free pass upon a railroad, to assume all risk of accident which may happen to him while on the train, by which his person may be injured, is valid. The accident was due to the negligence of the servants of the company. The pass was a mere gratuity, and therefore the case does not conflict with *Railroad Co. v. Lockwood*, 17 Wall. 367, in which it was held that a similar limitation on a pass given to a drover, who was to accompany his cattle, was invalid; for there the court say the pass was not gratuitous, for it was given as one of the terms upon which the cattle were carried. *Quimby v. B. & M. Railroad Co.*, 23 N. E. Rep. 205 (Mass.).

There are only two cases on this subject exactly in point, — *Griswold v. Railway Co.*, 53 Conn. 371, in which it was held that the limitation was valid, and *Railway Co. v. McGowen*, 65 Tex. 643, *contra*.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS. — The defendant was indicted for non-payment of license fee, under a law exacting a fee of one dollar from a physician who had resided for four years in the town where he took out his license, and five dollars from one who had resided a less time. *Held*, that the law was unconstitutional as imposing unequal burdens on citizens. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment." The present case was not within the exception, because the distinction as regards length of residence had no connection with the public purpose of a license law, namely, the protection of the public against charlatans. *State v. Pennoyer*, 18 Atl. Rep. 878 (N. H.).

¹ *Cline & Co. v. Templeton*, 78 Ky. 550.

CONSTITUTIONAL LAW — LIBERTY — POLICE POWER. — *Held*, an act providing that the wages of miners and certain others shall be paid in lawful money of the United States, and an act declaring unlawful every contract by which the right to receive wages in lawful money is waived, are constitutional. *Hancock v. Yaden*, 23 N. E. Rep. 253 (Ind.).

The law in Pennsylvania and West Virginia is directly the reverse. *State v. Goodwill*, 10 S. E. Rep. 285 (W. Va.), digested in 3 Harv. L. Rev. 334.

CONSTITUTIONAL LAW — POLICE POWER — DEPRIVATION OF PROPERTY — FIXING WATER-RATES. — Const. Cal., art. 14, § 1, provides that the rates for the use of water in any city shall be fixed annually by the board of supervisors of such city. Defendants passed an ordinance fixing rates so low as to make it impossible for the plaintiff to furnish water without a loss. *Held*, that the State possessed, and could delegate to the defendants, only the power to regulate the rates. This power to regulate property did not include the power to destroy. By putting the rates so low as to prevent any gain, the defendants had practically destroyed the value of the plaintiff's works. Therefore, this ordinance went beyond the power given by the State Constitution. *Spring Valley Water-Works v. San Francisco*, 22 Pac. Rep. 910 (Cal.).

Since *Munn v. Illinois* settled the right of a State Legislature to regulate a business of a *quasi* public nature, the extent of this power has frequently been questioned. It is undoubtedly for the Legislature to say whether the regulation is reasonable or not. This legislative discretion is subject, however, to the limitation that the owner of the property cannot be entirely deprived of profit. It has been claimed that a fair rate of gain, say three per cent. at least, must be left him; but Brewer, J., seems to have stated the law when he said: "The right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some income from their investment. As to the amount of such compensation, if some compensation is in fact secured, the Legislature is the sole judge." *Railway Co. v. Dey*, 35 Fed. Rep. 866, 877; *Banking Co. v. Smith*, 128 U. S. 174, 179. Contrary to this view is a recent decision in N. Y., where, for part of the business of a grain elevator, the "actual cost" was fixed as a maximum charge, and the regulation was sustained. *People v. Budd*, 22 N. E. Rep. 670, digested 3 Harv. L. Rev. 282.

CONTRACTS — ILLEGALITY — TRUSTS. — B. contracted with the plaintiff corporation for carbons for electric lights. The plaintiff assigned this contract and all the rest of his business to the defendant, in pursuance of an agreement to form a "trust." The carbons were manufactured at the plaintiff's factory and delivered to B., but were billed in the name of the "trust." The money was paid into court, and the question is whether the plaintiff corporation or the "trust" ought to have it. *Held*, the agreement for a "trust" was illegal, and the plaintiff could have refused to assign; but as it did assign, it became a party to the illegal transaction; and as the goods were supplied in the name and under the responsibility of the "trust," the receiver of the "trust" is entitled to the money. *Pittsburg Carbon Co. v. McMillin*, 23 N. E. Rep. 530 (N. Y.).

CORPORATIONS — NOTICE TO STOCKHOLDERS. — A shareholder gave notice of his intention to withdraw, and demanded certain payments to which he was entitled under the original by-laws. These by-laws had been changed, subsequently to the shareholder's admission to the corporation, without his knowledge. *Held*, that a shareholder is not bound to take notice of modifications of by-laws from the records of the corporation, but is entitled to treat the by-laws in force when he became a member as still existing, unless actual notice has been given him. *McKenney v. State Loan Ass'n*, 18 Atl. Rep. 905 (Del.).

CORPORATIONS — RIGHTS WHEN STOCKHOLDERS IN RIVAL CORPORATIONS. — A railroad corporation may, as a means of collecting a debt, acquire stock in another company, and it may thus gain control of a majority of the votes. If, however, the roads are rival lines and the interests of the two are opposed, the minority of the stockholders in the last-named company may get an injunction restraining the corporation owning a majority of the stock, and all persons acting in its behalf, from voting on this stock in the election of officers, or from exercising any control over the affairs of the company. *Memphis & C. R. Co. v. Wood*, 7 So. Rep. 108 (Ala.).

DOWER — EQUITY OF REDEMPTION. — A widow who has joined with her husband in a mortgage of his land, demands that the executor sell the land under a power of

sale given in the will, pay off the mortgage, and assign dower out of the surplus to the extent of one-third the value of the unincumbered land. *Held*, that dower is restricted to one-third the value of the equity of redemption, and that the widow must contribute to pay off the debt, and cannot throw the whole upon the heir. The power of sale in the will shows no intention of the testator to vary this rule. *Burnett v. Burnett*, 18 Atl. Rep. 378 (N. J.).

The case contains an able discussion of a point on which there is a remarkable dearth of authority. Dower attaches only to legal estates, never to equitable. In joining in the mortgage, the widow released absolutely all rights at law. Logically, equity can give her no rights to the equity of redemption. Yet not till recently was this point definitely settled in England. *Dawson v. Whitehaven Bank*, 6 Ch. Div. 218. See 2 Sch. & Lef. 387, *accord.*; 2 Eq. Cas. Ab. 387, pl. 11; Amb. 687; 1 Bligh, 104, at 123, *contra*. By statute (3 & 4 Will. IV. c. 105) to-day dower in equities of redemption is allowed.

In this country, a mortgage has long been treated, both at law and equity, as a pledge; for many, if not all, purposes the mortgagor's interest is a *legal* estate. Dower attaches to this as to other legal estates. As against the mortgagee, the right is lost; but if the debt be paid off, it revives in the whole land. 1 Scribner on Dower (2d ed.), p. 486. It remains to work out the rights of contribution between the widow and the representatives of the husband. In the following cases the widow is considered as a surety for the husband's debt, and is allowed indemnity from the personal estate. 10 Rich. Eq. 285; 1 Md. Ch. Dec. 202; 3 Met. (Ky.) 578; 12 Serg. & R. 18; 8 R. I. 160; 69 N. C. 67; and in two cases she was allowed to throw the debt upon the heirs. *Kling v. Ballyntine*, 40 Ohio St. 391; 92 Ind. 180.

In New York, it is held that an inchoate right of dower is not such an estate as can be pledged; that the widow is not a surety, but has absolutely extinguished her right to the extent of one-third of the mortgage debt. She is not entitled to exoneration from the heir—*Howley v. Bradford*, 9 Paige, 200; see 5 John Ch. 452; 13 Mass. 162; 1 Stock. Ch. 361,—nor (*semble*) from the personal estate. 1 Scribner on Dower, 511. Though there are statements in the same jurisdictions to the contrary. 18 Atl. Rep. at 380; 3 Pick. at 481; 3 Paige, 363.

EVIDENCE—RES GESTA.—In an action to recover damages for the death of the plaintiff's son, it appeared that the defendant's track was spread at the place where the injury occurred. *Held*, that it was no error to admit evidence that, about thirty minutes before the accident, the track-walker said to the section-boss, "The track is spread over beyond Rush." *Texas Ry. Co. v. Lester*, 12 S. W. Rep. 955 (Tex.).

In this case the court lays stress upon the fact that the communication was made by an agent of the company in the course of his duty, but it would seem that it would have been equally admissible had it been made by a stranger. The point this evidence went to prove was not the actual condition of the road, but the knowledge of the defendant. For this purpose, the communication to the section-boss was the most direct evidence possible, and it was not as an exception to the hearsay rule that it was admissible. 15 Am. L. Rev. 79.

HABEAS CORPUS — The defendant had, before these proceedings were begun, illegally parted with the custody of the child in question, and did not know his whereabouts. *Held*, that the writ should issue,—by Lord Esher, M.R., since the defendant had parted with the custody of the child by an illegal act; by Fry, L. J., because the facts indicated a purpose to evade the process. *Reg. v. Barnardo*, 24 Q. B. Div. 283.

INSURANCE—BREACH OF CONDITION.—The plaintiffs shipped certain goods under a bill of lading which provided that the carrier, in case he should become liable for the loss of the goods, "should have the full benefit of any insurance that may have been effected upon or on account of said goods." The goods were then insured by the defendants under a policy which provided that in case of loss the assured would "subrogate to the insurers all their claims" against the carriers. The goods were lost by the negligence of the carrier, and the plaintiff brought an action on the policy. *Held*, the plaintiff cannot recover; for, if the insurance company should pay the loss and bring an action in the name of the shipper, the condition in the bill of lading would protect the carrier, and therefore the condition in the policy is nullified. *Fayerweather v. Phenix Ins. Co.*, 23 N. E. Rep. 192 (N. Y.).

MASTER AND SERVANT—NEGLIGENCE.—Builders contracted with a land-owner

to build houses. The contract provided that the defendants, a firm of iron-founders (selected by the land-owner's architect), should lay a fire-proof roofing on the house, for which the builders were to pay £213, and were also to provide scaffolding and other assistance. The defendants employed their own workmen. In the course of the work the plaintiff, one of the builders' workmen, was injured by the negligence of one of the defendants' workmen. *Held*, by Cotton and Lopes, L. J.J. (Fry, L. J., dissenting), that the defendants were sub-contractors under the builders; that they and their workmen must be taken to have been in the employment of the builders; that the man who caused the injury and the plaintiff were consequently under a common master and engaged in a common employment, so the action could not be maintained.

Fry, L. J., in his dissenting opinion thought that the defendants were independent contractors; but that whether they were or not, their workmen were not in the service of the builders; that the man who caused the injury and the plaintiff were not under a common master, although engaged in a common employment. *Johnson v. Lindsay*, 23 Q. B. D. 508 (Eng.).

PARTNERSHIP — STATUTE OF FRAUDS — INTEREST IN LAND. — The contract of a partner to withdraw from the firm and assign his interest to the other partners is an agreement to assign an interest in land, and must be evidenced by a sufficient memorandum within the Statute of Frauds. *Gray v. Smith*, 43 Ch. Div. 208 (Eng.).

POST-OFFICE — THREATENING POSTAL CARDS. — A postal card on which is a demand for a debt and a statement that "if it is not paid at once, we shall place the same with our lawyer for collection," is non-mailable matter within 25 St. U. S. 496, prohibiting the mailing of an envelope, wrapper, or postal card on the outside of which is language of "defamatory or threatening character, or calculated and obviously intended to reflect injuriously upon the character or conduct of another."

But a postal card containing the words "Please call and settle account, which is long past due and for which our collector has called several times, and oblige," etc., is not within the statute, as the language is not threatening, or calculated to attract public notice. *U. S. v. Baley*, 40 Fed. Rep. 665.

REAL PROPERTY — COMPENSATION FOR OBSTRUCTING ANCIENT LIGHTS. — A warehouse, authorized by statute, darkened the lights, some ancient, some modern, of an abutter. *Held*, that apart from the words of the statute, the measure of damages should include the modern lights, since their darkening was a natural consequence of the obstruction of the ancient lights. *In re London, Tilbury, & Southend Railway Co. et al.*, 24 Q. B. Div. 326.

REAL PROPERTY — POSSIBILITY UPON A POSSIBILITY. — The testator left land in trust for his unmarried daughter for life, remainder to any husband whom she might marry, remainder in fee to their children. *Held*, that the legal remainders were void, since she might marry a man unborn at the testator's death. The rule against a possibility upon a possibility is an absolute rule, independent of the rule against perpetuities. *In re Frost*, 43 Ch. D. 246.

This is the first case to follow the rule laid down in *Whitby v. Mitchell*, 42 Ch. D. 494. For a digest of this case and references to the authorities on this disputed point see 3 Harv. L. Rev. 284.

REAL PROPERTY — QUITCLAIM DEED. — The grantee under a quitclaim deed takes the estate subject to the equities. For when a person purchases of another who is willing to give only a quitclaim deed, the purchaser is bound to inquire at his peril what outstanding equities exist. He cannot be deemed a purchaser without notice. His grantor virtually declares to him that he will not warrant the title, and it may be presumed that the purchase price was fixed accordingly. *Steele et al. v. Sioux Valley Bank*, 44 N. W. Rep. 564 (Ia.).

STATUTE OF FRAUDS — MEMORANDUM — PAROL EVIDENCE. — Where a memorandum of a contract for the sale of land, which failed to identify the property, and a receipt "on account of the purchase-money for the Fleton Manor House estate," signed by the defendant, were connected by parol evidence, *held*, there was a good memorandum within the Statute of Frauds. *Oliver v. Hunting*, 62 L. T. Rep. N. s. 108 (Eng.).

STATUTE OF LIMITATIONS — DIVIDENDS — DEMAND NECESSARY. — An action was brought to recover dividends declared upon the stock of the defendant corporation. It appeared that these dividends had not been paid for many years,

and that they stood as due on the books of the company. The prescription of thirteen years was pleaded. *Held*, that dividends on stock are payable only on demand, and that until demand and refusal prescription does not run against the person entitled. *Armant v. New Orleans & C. R. Co.*, 7 So. Rep. 35 (La.).

TORT — TRESPASS BY CATTLE. — The plaintiffs were owners of certain unenclosed tracts scattered through the public lands in Utah. They sought an injunction to restrain the defendants from pasturing their cattle on this domain. *Held*, that a decree could not be granted, even though the cattle were sure to trespass on plaintiffs' land. The common-law rule that every one must restrain his stock on his own land is not applicable to the sparsely settled portions of the West. *Bufoord v. Hantz*, 10 Sup. Ct. Rep. 305.

This decision is in accord with the decisions of several of the Western States. It would seem that the case might have been put on the short ground that the Utah statute made it the duty of the plaintiffs to fence; but Miller, J., in giving the opinion of the court, says the English rule has no application whatever. For an interesting discussion of the origin of the common-law liability, see Holmes, *Com. Law*, 10.

WILLS — CONSTRUCTION. — The testator left a legacy and a power of appointment to his "executors herein named." A. renounced probate. *Held*, that he was entitled to the legacy and the power. *In re Mainwaring*, 62 L. T. Rep. N. S. 63 (Eng.).

REVIEW.

PRINCIPLES OF THE LAW OF CONTRACT. By Reuben M. Benjamin. Bloomington, Ill. 1889. 12mo. Pages xi and 168.

This outline treatise on the law of contract is confessedly an attempt to hasten codification. While one may perhaps be permitted to ask *cui bono?* with reference to this object, yet it must be admitted that Mr. Benjamin has stated admirably, and in very concise form, the essential principles of this branch of the law.

The book follows very closely the division of the subject adopted in Anson on Contracts. After showing, by a series of narrowings, the position which contracts occupy in the law, it discusses the Formation, Interpretation, and Discharge of Contracts, confirming each step by well-selected references from a few leading jurisdictions. No attempt is made to discuss controverted points, or even to notice them as such, — an unfortunate feature in a book which does not profess to be of a wholly local character, but excusable, perhaps, considering the codification bias of the author. The same is true of the preponderance of Illinois citations and extracts from Illinois statutes.

While such a book, of necessity, cannot be of very great value to the practising lawyer, it is admirably adapted to the use of students, especially in the rapid reviews to which they are so peculiarly liable. As a supplement to the somewhat disconnected system of teaching by cases, such a book, for purposes of coöordination, is very useful.

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THE BURDEN OF PROOF.

IF we conceive to ourselves a legal system in which the pleadings, if any there be, admit of only one defence, that of mere negation,—that is to say, where not merely the pleading is negative in form, but where no other than a purely negative defence is open under it, and all other defences, as if they were cross actions, require a separate trial; we can see that the phrase Burden of Proof (*Onus probandi*, *Beweislast*, *Fardeau de la preuve*) may have a very simple meaning. Under such a system the defendant has nothing to prove; it is the plaintiff, the *actor*, who has the duty of proving, while the defendant, the *reus*, has only the negative function of baffling the plaintiff.

If, on the other hand, we picture a system in which any defence whatever may be open upon a plea of general denial, in which a defendant who stands upon the record as merely denying, may, at the trial, turn himself into a plaintiff by setting up an affirmative defence, and the original plaintiff may become a defendant by merely denying this new case of his adversary; then we observe that so simple a conception of the proof and the duty of proving, is no longer possible. Either party may have it, and it may shift back and forth during the trial, because each party in turn may set up, in the course of the trial, an affirmative ground of fact, which, if he would win, he must, of course, make good by proof. We can no longer say when the pleading is over and

before the trial begins, "the proof belongs here and cannot belong elsewhere ; the *onus probandi* is on the plaintiff and it cannot shift."

If now we further conceive that under this last system the action of the tribunal passing upon questions of fact is subject to review, so that an appellate court may have to consider whether such a body as a jury has acted reasonably in weighing evidence and counter-evidence, and whether the judge who has presided over a trial by jury has rightly ordered the trial, and rightly instructed the jury as to comparing and weighing evidence, we may see that questions will be introduced into legal discussion as to the respective duties of the parties in producing evidence at different points of the trial, and in meeting evidence produced against them, which may be wholly absent from another system where there is no such judicial revision of the method of using and estimating the evidence. The conception is brought to light of producing evidence to meet the pressure of an adversary's case, a duty which may belong to either party, and to both parties in turn ; and this conception now takes its place in legal discussion and requires its own terminology.

Let us further suppose that this new topic,— new in the sense of requiring now to be discriminated and discussed,— the mere duty of producing evidence, belonging thus to neither party exclusively, and to each by turns, gets also called the burden of proof ; it becomes plain that, as regards the meaning of this term, we have advanced from a region of simple and clear ideas to one which is likely to be full of confusion. We have, in fact, proceeded from conceptions which we may roughly describe as those of the Roman law and of some later systems founded upon it, to those which fill and perplex the books of our common law to-day.

If now, furthermore, recognizing that there are these two wholly distinct notions of the burden of proof, both called by the same name, we then observe that, as regards one of them, the duty of establishing, it is often a very difficult thing to determine whether a given defence be an affirmative one or not, and so to decide which party has the burden of the proof in this sense, and that the common-law judges have fallen into the way of giving as the test,¹ as the regular professional "rule of thumb," for tell-

¹ "The proper test is, which party would be successful if no evidence at all were given." Alderson, B., in *Amos v. Hughes*, 1 Moo. & Rob. 464.

ing who has this burden of proof, a precept which selects a circumstance common to both meanings of the term, and, indeed, generally characteristic of the other one, namely, the duty of going forward with evidence,— we shall see how the confusion is likely to be heightened.

Finally, if we go on to remark the way in which this topic is mixed up with that of presumptions, as when it is said that “presumptions of law and strong presumptions of fact shift the burden of proof,” we have a glimpse of another fruitful source of confusion; and in fact these two subjects of presumption and the burden of proof have intercommunicated their respective ambiguities and reflected them back and forth upon each other in a manner which it is wellnigh hopeless to follow out.¹

If all this or the half of it be true, it will be admitted that he would do a great service to our law who should thoroughly discriminate, explore, and set forth the legal doctrine of the burden of proof. But that would be a large undertaking. The fit performance of it would require a deep historical and critical examination of pleading and procedure, a careful consideration of legal presumptions and the principles of legal reasoning, and a just analysis of the fundamental conceptions of substantive law.² Such a discussion would have to take a wide range, for the subject belongs to universal jurisprudence, and the phrase and the things it stands for have a long descent. The leading maxims about it (often ill understood) are from the Roman law. During the Dark Ages and among our Germanic ancestors it had a very peculiar application. Conceptions coming from these periods still linger in our law, as will easily seem probable when we reflect that not only do our early judicial records show the ordeal and other mediæval modes of proof in full operation, but that wager of law and wager of battle were legally resorted to in England in the second and third decades of this century.³ With

¹“Look to the books,” says Bentham, in speaking of the burden of proof (*Works*, vi. 139), “and . . . instead of clear rules, such as the nature of things forbids to be established by anything but statute law, you have darkness palpable and visible.”

² It may be assumed, I suppose, that this phrase of the “substantive law,” and Bentham’s discrimination between this part of the law and that which is merely auxiliary to it, are already familiar. See *e. g.*, Bentham’s *Works*, vi. 7. “The adjective branch of law, or law of procedure, and therein the law of evidence, has everywhere for its object, at least ought to have, the giving effect . . . to the several regulations and arrangements of which the substantive branch or main body of the law is composed.”

³ For the mediæval conception of the burden, or, as it generally was in those times,

the use of the jury came a new set of ideas and a new system of pleading, very different from those of Rome and modern continental Europe; and gradually, with the slow and strange development of the jury system, and the irregular working out of common-law pleading, there has arisen and come into prominence a new set of discriminations. Much that never, in other times and countries, was the subject of legal discussion, and never passed out from the mass of the unrecorded details of forensic usage, now, through the working of our double tribunal of judge and jury, and the constant necessity which it brings of marking their respective boundaries, and re-viewing in a higher court the instructions given by the judge to the jury, comes into the region of law and judicial precedent. Of all these things will the writer of that careful statement of which I speak find it necessary to treat. It is probable that he will have abundant occasion to remark in this region that obscure operation of obsolete conceptions to which Sir Henry Maine referred in saying, "It may almost be laid down that in England nothing wholly perishes."¹

At present I am concerned with no such task as this, but only with an attempt to help rid this phrase, the burden of proof, of some of the distressing ambiguity that attends it, (a) by pointing out the different conceptions for which it stands, and bringing to view some important discriminations; (b) by considering the possibility of a better terminology for the subject; and (c) by indicating its proper place in our law.

I. In legal discussion this phrase is used in two ways:—

(1.) To indicate the duty of bringing forward argument or evidence in support of a proposition, whether at the beginning or later.

(2.) To mark that of establishing a proposition as against all counter-argument or evidence.

It should be added that there is a third indiscriminate usage,

the *privilege* of proof, see Von Bar's "Beweisurtheil" and Brunner's "Entstehung der Schwurgerichte," *passim*. See also Professor Laughlin's paper on "Legal Procedure" in "Essays on Anglo-Saxon Law," and Bigelow's "Hist. Proc. in England," ch. viii. In citing German books I should confess at once that I have to depend upon my friends for a knowledge of them, and should express my thanks to Mr. Gamaliel Bradford for the most generous kindness in reading to me not only the whole of the two books above named, but others. I am also very much indebted to the accurate learning of a younger friend, Mr. Fletcher Ladd, of the Boston bar, for a knowledge of the contents of several German treatises relating more exclusively to the subject of this article.

¹ Early Law and Custom, 187.

far more common than either of the others, in which the term may mean both or either of the first two. The last is very common; the first or second, that is to say, any meaning which makes a clear discrimination, is much less usual.

II. It will be convenient at this point to illustrate the different uses of the term by some citations.

(1.) The use of it in ordinary, untechnical speech, as indicating the effect of a natural probability or presumption, of the pressure of evidence or argument previously introduced, and of what is called a mere "preoccupation of the ground," may be seen in a passage from Bishop Whately's "Elements of Rhetoric":¹ "It is a point of great importance . . . to point out . . . on which side the presumption lies, and to which belongs the (*onus probandi*) burden of proof. . . . According to the most correct use of the term, a 'presumption' in favor of any supposition means . . . in short that the burden of proof lies on the side of him who would dispute it."

Of the same use of it in our law books, the following are instances: (a.) "The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a *prima facie* case against a party." (Best, Evidence, s. 273.) And again: "As . . . the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.: 'Which party would be successful if no evidence at all, or no more evidence, as the case may be, were given.'" (b.) A very clear expression of this sense of the term is found in Lord Justice Bowen's opinion in *Abrath v. No. East. Ry. Co.*² "In order to make my opinion clear, I should like to say shortly how I understand the term 'burden of proof.' In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails. The test, therefore, as to burden of proof is simply to consider which party would be successful if no evidence at all was given, or if no more evidence was given than is given at this particular

¹ Part I. c. 3, s. 2.

² 32 W. R. 50, 53. In the regular report (11 Q. B. D. 440, 455-6) the phraseology is slightly, but not materially, different.

point of the case, because it is obvious that during the controversy in the litigation there are points at which the onus of proof shifts, and at which the tribunal must say, if the case stopped there, that it must be decided in a particular way. Such being the test, it is not a burden which rests forever on the person on whom it is first cast, but as soon as he, in his turn, finds evidence which, *prima facie*, rebuts the evidence against which he is contending, the burden shifts until again there is evidence which satisfies the demand. Now, that being so, the question as to onus of proof is only a rule for deciding on whom the obligation rests of going further, if he wishes to win." (c.) From Mr. Justice Stephen's Digest of Evidence¹ we may gather that he understands this to be the established usage in England. And the like is laid down for Scotland.²

(2.) As to the second sense of the term, expressing the duty of the *actor* to establish the grounds upon which he rests his demand that the court shall move in his behalf,—that is the sense to which, since the year 1832,³ the Supreme Court of Massachusetts has sought to limit the expression. (a.) In 1854⁴ it was put thus: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established. In the case at bar, the averment which the plaintiff was bound to maintain was that the defendant was legally liable for the payment of tolls. In answer to this the defendant did not aver any new and distinct fact, such as payment, accord and satisfaction, or release; but offered evidence to rebut this alleged legal liability. By so doing he did not assume the burden of proof, which still rested on the plaintiff; but only sought to rebut the *prima facie* case which the plaintiff had proved." (b.) In the following passage may be seen an instance of what is not uncommon now-a-days, a recognition of this as one sense of the term, and also of the other. In 1878,⁵ Lord Justice

¹ Articles 95 and 96 and the illustrations.

² Dickson, Evidence in Scotland (2 ed.), ss. 12-16.

³ Powers *v.* Russell, 13 Pick. 69.

⁴ Central Bridge Co. *v.* Butler, 2 Gray, 130.

⁵ Pickup *v.* Thames Ins. Co., 3 Q. B. D. p. 600.

Brett remarked, with valuable comments on the case of *Watson v. Clark* (1 Dow, 336), that "The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts. . . . But when facts are given in evidence, it is often said that certain presumptions, which are really inferences of fact, arise and cause the burden of proof to shift; and so they do as a matter of reasoning, and as a matter of fact."¹ (c.) In New York,² Church, C. J., for the court, expresses himself thus: "The burden of maintaining the affirmative of the issue, and properly speaking, the burden of proof remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plaintiff's evidence."

(3.) A few cases may be added which illustrate the common confusion in the use of the term. (a.) A doctrine was formerly laid down in England that in prosecutions under the game laws, the defendant had the burden of establishing that he was qualified. This really rested in part upon the construction of the statutes.³ But it came to be laid down generally, as we read in Greenleaf to-day,⁴ that "where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." There is great sense in such a doctrine as indicating a duty of producing evidence, but little or none as marking a general duty of establishing; but by reason of the ambiguity of this phrase, the doctrine is afloat in both senses. That it should be limited, as a statement of the common law, to the sense of a duty of giving evidence, is plainly shown by the remarks of Holroyd, J.: "In every case the *onus probandi* lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own

¹ Compare the same judge in *Anderson v. Morice*, L. R. 10 C. P. 58 (1874), *Abrath v. No. East. Ry. Co.*, 11 Q. B. D. 440 (1883), and *Davey v. Lond. & S. W. Ry. Co.*, 12 Q. B. D. 70.

² *Caldwell v. New Jersey Co.*, 47 N. Y. 282, 290.

³ *The King v. Turner*, 5 M. & S. 206, 210 (1816): "There are, I think, about ten different heads of qualification enumerated in the statutes. . . . The argument really comes to this: that there would be a moral impossibility of ever convicting upon such an information." *Per Lord Ellenborough*. See *King v. Stone*, 1 East, 639 (1801), where the court was divided.

⁴ *Ev. i. s.* 79.

knowledge. . . . This indeed is not allowed to supply the want of necessary proof," etc.¹ (*b.*) A striking instance, at once of the common English sense of the term, and of the perplexing way in which this is mixed up with the other sense of it, is found in a recent opinion of so great a judge as Lord Blackburn. In an Irish negligence case² a very interesting discussion arose as to the relation between the court and the jury, and the circumstances under which a judge can direct a verdict; incidentally it touched the burden of proof. Lord Blackburn, who held, in this case, that a verdict should be entered for the defendants, put his view thus: To justify this, "it is not enough that the balance of testimony should be overwhelmingly on one side," so that a verdict the other way ought to be set aside, but "the onus must be one way, and no reasonable evidence to rebut it." By "onus" and "onus of proof," Lord Blackburn does not mean the duty of ultimately establishing a proposition; but his use of the term is so connected with that meaning, and with the doctrine that the general issue does not necessarily mean a negative case, that it will be instructive to quote his words: "It is of great importance to see on whom the onus of proof lies, for if the state of the case is such that on the admissions on the record, and the undisputed facts given in evidence on the trial, the onus lies on either side, the judge ought to give the direction, first, that if there are no additional facts to alter this, the jury ought to find

¹ King *v.* Burdett, 4 B. & Ald. p. 140 (1820). See also Steph. Dig. Ev. art. 96: "In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." Compare Best, Ev. ss. 275, 276. Bonnier, *Traité des Preuves* (4 ed.), i. 33: "La difficulté de la preuve . . . n'est point un motif suffisant pour intervertir les rôles." And again, 49: "C'est toujours au demandeur à prouver, et qu'il peut le faire, même lorsqu'il s'agit d'un fait négatif; il le pourra bien plus facilement si on admet cette sage restriction que, pour rendre la négative définie, il est permis d'obliger la partie adverse à préciser ses préférences." The sound common-law doctrine, together with a reference to statutes that change it, is found in Wilson *v.* Melvin, 13 Gray, 73, and Com. *v.* Laby, 8 Gray, 459. The question arising under the English Game Laws was afterwards regulated by statute. (1 Tayl. Ev., 8 ed., s. 377, note). Such statutes, exempting a party from the duty of giving evidence in certain cases, or imposing the "burden of proof" on the other, are common enough both here and in England. They might easily give rise to questions of construction as to the meaning of the phrase now under discussion. In dealing with one of these statutes (which had not, however, used the very phrase), it was said by the court in *Mugler v. Kansas*, 123 U. S. p. 674, that it simply determined what was a *prima facie* case for the government.

² Dublin, etc. Ry. Co. *v.* Slattery, 3 App. Cas. 1155.

against that party on whom the onus now lies" (p. 1201). "I think the recent decision of your Lordship's House in *Metropolitan Railway Company v. Jackson* conclusively establishes this doctrine in cases in which the onus was, on the issue, as joined on the record, on the party against whom the verdict was directed. I am of opinion that it is equally so when a fact found, or undisputed at the trial, has shifted that onus" (p. 1202). "The cases in which the principle that the onus may shift from time to time has been most frequently applied, are those of bills of exchange. At the beginning of a trial under the old system of pleading . . . the onus was on the plaintiff to prove that he was holder, and that the defendant signed the bill. If he proved that, the onus was on the defendant; for the bill imports consideration. If the defendant proved that the bill was stolen, or that there was fraud, the onus was shifted, and the plaintiff had to prove that he gave value for it. This . . . depends not on the allegation, under the new system, on the record, that there was fraud, but on the proof of it at the trial" (p. 1203). "It was laid down in *Ryder v. Wombwell* that 'there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies; if there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant,' and this was approved of and adopted in this House in the recent case of *Metropolitan Railway Company v. Jackson*. I have already given my reasons for thinking that the expression, 'the party on whom the onus of proof lies,' must mean, not the party on whom it lay at the beginning of the trial, but the party on whom, on the undisputed facts, it lay at the time the direction was given" (p. 1208). (c.) Baron Parke's statement in *Barry v. Butlin*¹ is well known: "The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him." This might seem to point to the duty of establishing. Does it? It describes only the duty of one, whoever he may be, having the *onus probandi*, whatever that may be, to produce evidence. Now, the common English conception is

¹ 2 Moore, P. C. 484; s. c. 1 Curteis, p. 640; and so Metcalf, J., in 6 Cuss. p. 319

that when he does have this and makes a *prima facie* case, the other party, and not he, is the one who then has the *onus probandi*; so that then Baron Parke's remark will apply to him.¹ Baron Parke's expression appears to be consistent with either view, since the duty of beginning and that of finally establishing, may rest upon different persons.² (*d.*) A recent case in the Supreme Court of Connecticut³ is a striking illustration of the perplexity that attends many attempts to deal with this subject in criminal cases. The defendant was prosecuted under a statute, for neglecting and refusing to support his wife. At the trial, under the usual plea of not guilty, he set up her adultery. The jury were charged that the defendant had the burden of proof to sustain the adultery beyond a reasonable doubt. A verdict for the State was set aside, and a new trial granted for misdirection. It was laid down by the court (Andrews, C. J.) that the burden of proof is on the government to prove its case in all its parts; that the issue is but one, the defendant's guilt, and that whenever a defence is so proved that a reasonable doubt is caused as to any part of the case, the jury should acquit. But in setting this forth, the court at the same time says: "If the defendant relies upon some distinct substantive ground of defence not necessarily connected with the transaction, . . . as insanity or self-defence, or an *alibi*, or, as in the case at bar, the adultery of the wife, he must prove it as an independent fact. . . . It is incumbent upon the defendant to establish the fact. . . . All authorities agree that the burden is upon the State to make out its accusation . . . beyond all reasonable doubt. . . . When a defendant desires to set up a distinct defence, . . . he must bring it to the attention of the court; in other words, he must prove it, . . . that is, he must produce more evidence in support of it than there is against it. When he has done this by a preponderance of the evidence, the defence becomes a fact in the case of which the jury must take notice . . . and dispose of it according to the rule before stated, that the burden is upon the State to

¹ Such is Baron Parke's own use of the term in *Elkin v. Janson*, 13 M. & W. pp. 662-3, and Lord Halsbury's and Lord Watson's in *Wakelin v. London, etc. Ry. Co.*, 12 App. Cas. 41; where also Lord Blackburn, having read Lord Watson's opinion, remarks: "In it I perfectly agree." See also Stephen, Dig. Ev. arts. 95 and 96, and L. J. Bowen, *ante*, p. 49.

² See *infra*, p. 66.

³ *State v. Schweitzer*, 57 Conn. 532 (1889).

prove every part of the case against the prisoner beyond a reasonable doubt."¹ The court here avoid saying in terms that the defendant has any "burden of proof," but they say it in substance. If the defendant must establish the insanity or *alibi* by the preponderance of the evidence, he has the burden of proving it. It would seem that the true theory of this case is that the defence has nothing to "prove,"² but has only to do what the court intimated in *Com. v. Choate* (105 Mass. 451), when it said: "The evidence which tended to prove the *alibi*, even if it failed to establish it, was left to have its full effect in bringing into doubt the evidence tending to prove the defendant's presence at the fire." So here, defendant need not establish the adultery; he need only bring the jury to a reasonable doubt about it; for, according to the theory of the case, *that* is a reasonable doubt of the defendant's guilt.³

III. The subject is, of course, very intimately connected with that of pleading.

(1.) It is important to notice further one or two peculiarities of the Roman law, already alluded to; for that body of law has given us the term *onus probandi* and a variety of often-quoted maxims about it. Under the system which prevailed in classical times, and for two or three centuries after the Christian Era,—a period which includes the great jurists whose responses are preserved in the Digest,—the *Prætor* sent to the *judex* a formula containing a brief indication of the plaintiff's claim, of the affirmative defence, if any, of the affirmative replication, if any, and so on,—with instructions to hear the parties and their witnesses, and then decide the case. No denials were mentioned in the formula, but each affirmative case was understood to be denied. Then followed a trial of each of these cases separately,—first, the plaintiff's; then, unless that failed, the defendant's; and then, unless that failed, the plaintiff's replication; and so on. What, in our

¹ For this exposition the court cite, among other cases, *Brotherton v. The People*, 75 N. Y. 159, and the charge in *Com. v. Choate*, 105 Mass. 451; and they remark that this last charge was "held to be correct." But surely this is misleading. The Massachusetts court held in effect that the charge was inconsistent and in part bad, but that it contained its own antidote, and therefore the verdict might stand.

² "It is a prisoner's burden, the only burden ever put upon him by the law, that of satisfying the jury that there is a reasonable doubt of his guilt." R. H. Dana, *arguendo*, *York's Case*, 9 Met. p. 98.

³ See the clear statements in *State v. Crawford*, 11 Kans. p. 44-5 (1873), and in *Scott v. Wood*, 81 Cal. 398 (1889).

system, is a plea in confession and avoidance, was, in the Roman system, merely a supposition of the truth of the opposite case, an anticipation of a possible proof of it, and an avoidance of it; nothing was really admitted. As illustrating this, I quote in a note from Professor Langdell's clear account of a procedure which is thought to have "differed but slightly in principle" from that of the period to which I now refer.¹

Now, under such a method, where every case presents, at the trial, a clear and unchangeable affirmation and denial, the phrase *onus probandi* (and so the leading Latin maxims about it) may have a very simple meaning. The proof, the burden of proving, belongs to the *actor*; it cannot shift, and cannot belong to the *reus*, whose function is not that of proving, but the purely negative one of repelling or making ineffective the adversary's attempts to prove.²

(2.) It would be possible to conduct legal controversies, as well as others, without any written or recorded pleadings, or in disregard of them. It has often been done. The convenient practice of trying cases upon agreed facts, whether resting on a statute³ or on the practice of the courts, will readily come to mind. As regards everything following the declaration in civil cases and the indictment in criminal cases, we are familiar in modern times with that state of things,—indeed the common law has always known it.⁴ An oral plea of not guilty and a written general

¹ *Equit: Pleading* (2 ed.), ss. 4-14. "There were . . . as many stages in the trial as there were pleadings. The first stage consisted of the trial of the plaintiff's case as stated in the libel. For this purpose the plaintiff would first put in his evidence in support of his case, and the defendant would then put in his evidence, if he had any, in contradiction. The evidence bearing upon the libel being exhausted, the next stage was the trial of the exception, which proceeded in the same manner as the trial of the libel, except that the defendant began, he having the burden of proof as to his exception. In this manner the trial proceeded, until all the evidence bearing upon each of the pleas in succession was exhausted, each party being required in turn to prove his own pleading, if he would avail himself of it (s. 8). . . . Finally it will be found that all the essential differences between a trial at common law and by the civil law, arise from this, namely, that by the common law a cause goes to trial with everything alleged in the pleadings on either side admitted, except the single point upon which issue is joined, while by the civil law it goes to trial with nothing admitted" (s. 12). This system has largely survived on the continent of Europe, in Scotland, and in our equity procedure.

² This is equally plain in any simple case under our system, such as *Hingeston v. Kelly*, 18 L. J. N. s. Ex. 360 (a neat case), and *Phipps v. Mahon*, 141 Mass. 471, a like instance, where the thing is well expounded.

³ E.g., St. 15 & 16 Vic. c. 76, s. 46.

⁴ Co. Lit. 283.

denial are very common answers, whatever may be the real nature of the defence. It may be remembered that within a few years it was formally recommended by a committee of the leading judicial and legal personages in England, appointed by the Lord Chancellor, that litigation should thereafter be conducted in the High Court of Justice without any pleadings. "The committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." The recommendation followed of a rule that "No pleadings shall be allowed unless by order of a judge."¹ The substitute for pleadings which these propositions contemplated was a brief endorsement upon a writ of summons, indicating the nature of the plaintiff's claim, and a brief notice from the defendant of any special defence, such as the Statute of Limitations or payment. Although these suggestions were not in form adopted, yet English common-law pleading has come down to a very simple basis indeed; and so generally in this country.

But whether there be pleadings or not, and whether they be simple or not, you come down, at some stage of the controversy, just as they did at Rome, upon a proposition, or more than one, on which the parties are at issue, one party asserting and the other denying. It may be that this issue is not stated in the pleadings and that it is left to come out at the trial, in the giving of evidence. An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so it is because the party making the admission sets up something that avoids the apparent effect of his adversary's facts; as subsequent payment avoids the effect of facts which show a claim in contract. When this happens the party defending becomes, in so far, the *actor* or plaintiff. In general, he who seeks to move a court to take action in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in setting up an affirmative defence, has the rôle of *actor (reus excipiendo fit actor)*, — must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law.² But he, in every case, who is the true *reus* or defendant holds a very different place in

¹ This interesting report may be found in the London Times for Oct. 8, 1881. It is signed by Lord Coleridge, Lord Justice James, Justices Hannan and Bowen, the Attorney-General (James), the Solicitor General Herschell, and others.

² Bonnier, *Preuves*, i. 30 (4 ed.): "Celui qui doit innover doit démontrer que sa prétention est fondée."

the procedure. He awaits the action of his adversary ; and it is enough if he simply repel him. The *reus* has no duty of satisfying the court ; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome, or, to use the more familiar figure, because the *actor* has not carried his case beyond the point of an equilibrium of proof, or, as the case may be, of all reasonable doubt.¹ Whatever the standard be, it is always the *actor* and never the *reus* who has to carry his proof to the required height ; for, truly speaking, it is only the *actor* that has any duty of proving at all. Whoever has the duty does not even make out a *prima facie* case till he comes up to the requirement, and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here, as well as at Rome, cannot shift, except as the position of *actor* shifts ; it is always the duty of one party and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out a case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, the thing that thus shifts and changes is not the peculiar duty of each party, -- for that remains peculiar, *i.e.*, the duty, on the one hand, of making out and holding good a case which will move the court, and, on the other, the purely negative duty of preventing this ; but it is the common and interchangeable duty of going forward with argument or evidence.

(3.) The question of how it shall be determined whether a particular claim or defence be an affirmative one might seem very

¹ Bracton, fol. 239 b ; Bonnier, *Preuves*, i. 51 (4 ed.), remarks : "Nos anciens auteurs, de leur côté, ont proposé divers expédients pour résoudre les questions douteuses. Les uns veulent qu'on tranche le différend par la moitié, ce que Cujas appelle avec raison *anile judicium*. D'autres proposent l'emploi du sort, emploi qui a été réalisé effectivement en 1644 dans la fameuse *sentence des bâchettes*." He adds in a note : "Par un juge de Melle qui avait fait tirer aux plaideurs deux pailles ou bâchettes, qu'il tenait entre les doigts. Heureusement pour l'honneur de la justice, elle a été reformée par le parlement de Paris."

simple, but often, in fact, it is not. It is far from being a mere question of the form in which a party phrases his claim or his defence, whether that be affirmative or negative. The general question might be answered on various principles. It might turn on the mere form of the pleadings, and in some instances it does.¹ In civil cases, and, in some jurisdictions, in criminal cases, matters are often in no such simple condition. "Undoubtedly," says Mr. Justice Holmes, "many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality. Where the line should be drawn might differ, conceivably, in different jurisdictions." (*Starratt v. Mullen*, 148 Mass. p. 571.) In general, the considerations of detail which affect this matter are those of precedent and of mere practical convenience, tempered by logic. Whatever they be, it is not my purpose to deal with them; it is, as I have indicated before, too large a matter. If there were space, I should insert here the substance of Professor Langdell's very valuable statement upon this subject;² but as there is not, I beg to commend it to the perusal of the reader. Bentham recognized the difficulties attending this subject, and offered as his chief and indispensable remedy "the restoration of that feature of primitive justice,—confrontation of the parties at the outset *coram judice*," and the application of the maxim that he should have the burden "on whom it would sit lightest," *i.e.*, who could fulfil the requirements with the least "vexation, delay, and expense."³

(4.) But now, keeping all this in mind, it is very important to remark certain sources of ambiguity.

(a.) He who has to move the court and establish his case, has also, as we see, to go forward with the proof of it; the other may rest until then, and will win without a stroke if the first remain idle. This duty is generally given as the distinctive test of an affirmative case,—"Which party would be successful if no evidence at all were given."⁴ But when the *actor* has gone forward and made his *prima facie* case, he has brought a pressure to bear

¹ See Professor McClain's valuable article on "The Burden of Proof in Criminal Prosecutions," 17 Am. Law Review, 892.

² *Equity Pleading* (2 ed.), ss. 108 *et seq.* See also Pomeroy, *Remedies*, c. 4.

³ Bentham, *Works*, vi. 139, 136.

⁴ *Amos v. Hughes*, 1 Moo. & Rob. 464.

upon the *reus*, which will compel him to come forward; and he again may bring a pressure to bear upon the *actor* that will call him out. This duty of going forward in response to the pressure of a *prima facie* case, or of a natural or legal presumption,—a duty belonging to either party,—is, in its nature, the same as that which rests upon the *actor* at the beginning, and which is put as the distinctive test of an *actor*; it is merely a duty of going forward. This fact was perceived, and it led to a use of the test, which imperceptibly draws the mind away from the notion of an affirmative case, to something quite different. "As, however," says Best,¹ "the question of the burden of proof may present itself at any moment during a trial, the test ought, in strict accuracy, to be expressed thus, viz.: Which party would be successful if no evidence at all, or no more evidence, as the case may be, were given?" Now, when this has been said and accepted, all notion of a duty that is limited to the beginning of a case is thrown away, and so every circumstance that discriminates the *actor* and the *reus*. We are told that we may know him who has the burden of proof by considering whether, *at any given moment*, a party would lose if the case stopped then and there. But that is a test that may apply to either party, for it points to a situation in which either may find himself, that of having the duty of going forward. In short, the test for the burden of establishing has become a test which is good only for the burden of producing evidence. This duty now comes prominently forward, and the other is lost sight of. Meantime, this change is unobserved. And, as we have but one term for the two ideas, it gets used now for one and now for the other; and, again, in a way which makes it impossible to say what is the meaning; and so there is no end of confusion.

(b.) Another source of ambiguity relates to the "shifting" of the burden of proof. We see that the burden of going forward with evidence shifts from side to side, while the duty of establishing his proposition is always with the *actor*, and never shifts. But as we have only one phrase for the two ideas, we say, alternately, that the burden of proof does and does not shift. And then still another ambiguity. The burden of establishing is sometimes called "the burden of proof upon the record," and it is assumed that the record shows the full allegations of the parties.

¹ Evid. 1, 268, and so Bowen, L. J., in *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440.

But in fact, as we have seen, the record very often indeed fails to do that, and when the general issue is pleaded the denying party is often allowed in his evidence to set up affirmative defences.¹ So far as the record shows us anything in such a case, the plaintiff is the *actor*, and the burden of establishing the proposition of the case appears to be upon him. And yet, since his adversary may offer evidence of an affirmative case, and when he does, becomes the *actor*, and has, with his affirmation, the burden of establishing it, this burden of establishing has shifted, because a new proposition has been introduced. The real fact is, that under this mode of pleading the point of time required for setting up the affirmative case is different from that fixed where the pleading is scientific; instead of requiring that it be disclosed before the pleadings are ended, it is allowed to be made known during the progress of the trial, and the sense in which we say that the burden of proof has shifted is that sense in which, under a strict rule of pleading, it would be said to shift while the pleadings are going forward, being first upon the plaintiff, "shifting" to the defendant when he pleads in confession and avoidance, and remaining fixed at the end where the last purely negative plea leaves it. In both cases the burden of establishing is said to "shift," in the sense that a new affirmative case has been disclosed, which carries with it the duty of making it out. It remains just as true as ever that the burden of establishing a given proposition in issue never shifts, *i.e.*, it is always upon the *actor*; but since new issues may be developed at the trial, we say that the burden of establishing shifts during the trial. Accordingly we find that Chief Justice Shaw, in the very act of starting the peculiar practice which has since existed in Massachusetts of limiting the meaning of the term "burden of proof" to the one meaning of the *actor's* duty of establishing his proposition, lays it down that, "Where the party having the burden of proof gives competent and *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of

¹ Such is a very common doctrine about the defence of contributory negligence. Ind. R.R. Co. v. Horst, 93 U. S. 291; Wakelin v. Ry. Co., 12 App. Cas. 41. In Missouri (Stone v. Hunt, 94 Mo. 475), as in Ireland (Dublin, etc. Ry. Co. v. Slattery, 3 App. Cas. 1155), the defendant must plead contributory negligence specially. See Hubbard v. Harden Exp. Co., 10 R. I. p. 254; and compare Hutch. Carriers, § 766-8.

it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact."¹

It is common now, in Massachusetts, to say that "the burden of proof never shifts."²

(c.) Another source of ambiguity lies in the relation between legal presumptions or rules of presumption, and the burden of proof. What is true of these phrases in one sense may not be true in another. When it is said that the burden of establishing lies upon the *actor*, this refers to the total proposition or series of propositions which constitute his disputed case. As when in an action for malicious prosecution³ the Master of the Rolls said: "The burden of proof of satisfying a jury that there was a want of reasonable care lies upon the plaintiff, because the proof of that . . . is a necessary part of the larger question, of which the burden of proof lies upon him." Suppose, then, that it be settled in any case, upon the principles, whatever they be, which govern the question, that the burden of establishing a given issue is upon A, and that upon some detail of this issue a rule of presumption makes in favor of A, *e.g.*, that he has to establish a will, and that the presumption of sanity helps him as to this one element of his proposition;⁴ or that he has to establish the heirship of a child, including its birth of certain parents, in wedlock, and legitimately, and that the presumption applying in such cases helps him as to the last point;⁵ on the supposition, I say, that in any given case the burden of establishing is thus fixed, and that the presumption

¹ Powers *v.* Russell, 13 Pick. 69, 77 (1832).

² As in 142 Mass. p. 360; but this, even under the existing practice in Massachusetts, is not quite true, for after the answer there need be no replication; while anything is open to the plaintiff at this stage. By the St. 1836, c. 273, special pleas in bar in Massachusetts were abolished in all civil actions, and the general issue substituted. This had been the law as to certain sorts of action before. Of the condition of the law as it stood after this change Mr. B. R. Curtis, afterwards Mr. Justice Curtis, said (Report of Commissioners on the Massachusetts Practice Act, Hall, p. 139): "He who now surveys what remains sees every plaintiff left to inhabit the old building, while all others are turned out of doors." The "Practice Act" of 1851, prepared by these Commissioners, abolished the general issue in all but real and mixed actions and substituted a stricter system. But this strictness was in part done away the next year, when the first Practice Act was repealed, and a new one enacted. Under this one, now in force, no pleadings are required after the defendant's answer (compare St. 1851, c. 233, s. 28, with St. 1852, c. 312, s. 19), and the old looseness still exists from this point on.

³ Abrath *v.* The N. E. Ry. Co., 11 Q. B. D. p. 451.

⁴ Sutton *v.* Sadler, 3 C. B. N. S. 87.

⁵ Such a case may easily be constructed out of Gardner *v.* Gardner, 2 App. Cas. 723.

thus operates as touching a part only of the total proposition, how does this affect the duty of the *actor*? Of course it does not touch the burden as regards the whole issue, which covers not only the presumed thing, but more. Does it then transfer to the other the duty of establishing a part of the issue? If so, we may easily suppose a variety of presumptions, which would split up the issue in a manner very confusing to a jury or even a judge. What happens in such a case seems rather to be what the Romans called a *levamen probationis*, i.e., the presumption has done the office, as regards a particular fact, of *prima facie* proof, so that the *actor* need not in the first instance go forward as to this matter; his case is proved by this, without evidence, just as it would have been by such an amount of evidence as makes a *prima facie* case. Of course his case may not be finally proved thus, for he must meet the defendant's counter proof, and must make good his total proposition not merely at the beginning but at the end of the trial.

Such is the import of the case of *Sutton v. Sadler*,¹ where, in an action of ejectment by an heir-at-law against a devisee, the court held it a misdirection to instruct the jury that the heir-at-law was entitled to recover unless the will was proved; but when the execution of the will was proved the law presumed sanity, and, therefore, the burden of proof shifted and the devisee must pre-

¹ 3 C. B. N. s. 87, and so *Symes v. Green*, 1 Sw. & Tr. 401. So *Baxter v. Abbott*, 7 Gray, 71 (1856), where a decision on an appeal from a decree of a court of probate allowing a will, sustained the ruling (p. 74) that "the burden of proof was on the appellee to show to their [the jury's] reasonable satisfaction that the testator was of sound mind when he executed the instrument in question; that the legal presumption, in the absence of evidence to the contrary, was in favor of the testator's sanity, and that the appellee was entitled to the benefit of this presumption, in sustaining the burden of proof which the law put upon him." "We all agree [p. 83] that it ['the legal presumption'] does not change the burden of proof, and that this always rests upon those seeking the probate of the will." And so *Brotherton v. The People*, 75 N. Y. 159 (1878, Church, C. J.), and *People v. Garbutt*, 17 Mich. 9 (1868, Cooley, C. J.); *Dacey v. The People*, 116 Ill. 555; and a great number of criminal cases in this country holding the like; to the effect that the burden of establishing sanity in an indictment for murder is upon the government, that the presumption of sanity puts upon the defendant the burden of going forward with evidence upon this question, but does not affect the duty of ultimately sustaining sanity,—a fact, which, upon the theory of these cases, is none the less a part of the government's case because it is impliedly and not in terms alleged. This doctrine was adopted in Massachusetts as regards the defence of idiocy, an original absence of natural capacity, in *Com. v. Heath*, 11 Gray, 303 (1858), and by Chief Justice Gray and Morton, J., as to insanity in general, in *Com. v. Pomeroy* (*Wharton, Homicide*, (2d ed.), Appendix, 753, 754, 756); and it is understood to be now the law in that State.

vail unless the heir-at-law established the incompetency of the testator, and, if the evidence made it a measuring cast and left them in doubt, they ought to find for the defendant. The court held, on the contrary, that while the presumption of sanity freed the defendant from the need of proof in the first instance, it did not relieve him of the fixed, unshifting burden of making out his case of a valid will. In this case there is much talk about whether the presumption of sanity be a presumption of law or of fact. Is not this an idle discussion? There is no rule of legal reasoning which is more commonly called a presumption of law than this, which, *prima facie*, attributes sanity to human beings. That it is a rule of presumption and a legal rule there is no doubt. The important question in any particular instance is what is the effect and operation of the rule, not what its name is. And in *Sutton v. Sadler* the result is that where the case is an affirmative one, the effect of this legal rule of presumption, on a part of the *actor's* case, is that of making out a *prima facie* case on this part, and not that of shifting or otherwise affecting the burden of establishing this part of the case.

It is true then that "presumptions shift the burden of proof," in the sense of the duty or going forward with evidence. And in this sense they relieve at the outset, as touching the thing presumed, him who has the duty of establishing; they are always *levamen probationis*. It is also true that rules of presumption may fix the duty of establishing, because they are rules of law; and a rule of law which determines who has the affirmative case may be cast in the form of a presumption; this is a very common form of expressing all sorts of rules of law. But it is not the nature of rules of presumption, simply as such, to determine the duty of establishing the thing presumed, while it is their nature to fix the duty of meeting the presumption, *i.e.*, of coming forward with argument or evidence. When, therefore, if ever, a rule of presumption does fix the duty of establishing, it is because of what may be called an outside reason, *e. g.*, the existence of a statute or a rule of the substantive law which imparts to the presumption this quality of determining the affirmative side; or, to speak exactly, it is the statute or the substantive law that determines it, and not the rule of presumption.¹ It must be firmly held in mind that rules

¹ To illustrate what is meant by this, let me refer to a passage in Professor Langdell's powerful and remarkable book on *Equity Pleading* (2 ed.), ss. 117 and 118. In actions

of presumption are adopted for a variety of reasons ; that they are not fixed merely with reference to litigation and procedure, but are a part of the machinery for the general administration of justice. They are propositions which, for any purpose, fix the legal equivalence of one set of facts with another. The need of them comes up very often in considering whether a given fact, as death, or life, or title, has been sufficiently proved, but often, also, in determining merely what the substantive law of property or persons may be.¹ The validity, then, of this proposition that a presumption of law fixes the burden of proof (in the sense of establishing), depends on the question whether in any given instances it fixes the affirmative or the negative character of a case for purposes of procedure ; and since that question has to be first determined, there seems to be no need of introducing the notion of presumption at all.

IV. As regards a proper terminology for the conceptions now indicated by the "burden of proof." It seems impossible to approve a continuation of the present state of things, under which ideas of great practical importance, and of very frequent application, are so imperfectly and dubiously intimated. What can be done ? Of courses that are theoretically possible there are three ; to abandon the use of this phrase and choose other terms, or to

to recover property, he says, the foundation of them is the plaintiff's present ownership; it will not, therefore, be enough to allege that he or his ancestor once had a good title unless on proof of that "the law will raise a presumption that the plaintiff owns the *res* now," or, as it is again put, "that he continues to own it until his death;" but there is such a presumption ; had the right of alienation been coeval with the right of property, this would probably have been otherwise; but under the feudal system, as regards land, there was no such right of alienation. "When alienation came to be allowed, the presumption, of course, ceased to be conclusive, but it remained until rebutted; and, as there has been nothing to destroy it, it doubtless continues to exist to this day," etc., etc.

The conception here appears to be that the former rule of real property was a conclusive "presumption of law," that the statute made it a rebuttable presumption of law, and that this presumption of law fixes the "burden of proof" and so determines who holds the affirmative case (see s. 108). But why bring in the term or the notion of "presumption"? Does it not all come down to this that a former rule of the substantive law has been changed by statute, and that he who would avail himself of the statute novelty must set up and prove the matter that entitles him to it, — according to the principle of the rule (Stephen, Pleading (Tyler's ed.), 295, note y) that "regulations introduced by statute do not alter the forms of pleading at common law." The rule, in this instance, which determines the affirmative case, seems to have nothing to do with any notion of presuming the continuance of a state of things which is notoriously obsolete, and the "presumption" appears to be a mere form of expression.

¹ On this subject the writer begs to refer to an article on "Presumptions and the Law of Evidence" in 3 Harv. Law Rev. 141.

fix upon it one of the two meanings now in use, and find another phrase for the other. In favor of the first course, there are the obvious reasons of clearness and precision. But it would be a mere dream to imagine that the phrase could ever be wholly banished from legal usage. We might as reasonably expect to exclude it from the common speech of men. Use it we must.

It remains only to choose in what sense it shall be used. Or shall we say here also, that it is hopeless to make a change? No doubt it is difficult, but it cannot be hopeless. A change is simply necessary to accurate legal speech and sound legal reasoning; and we may justly expect that those who have exact thoughts, and wish to express them with precision, will avail themselves of some discrimination in terminology which will secure their end. Particular courts, or judges, or writers, may adopt the course of discarding this phrase altogether and substituting other terms; that is an intelligible plan. But if any one prefers to follow the course which seems certain to be taken by the current of legal usage, that of retaining the phrase in some sense or other, he will be driven, if he would speak accurately, to tie up the term to a single meaning. Which then shall it be, that of going forward with proof, or that of establishing a given proposition in the upshot?

(a.) In favor of the former there seem to be these considerations: (1.) It is the meaning that the term has in common speech. Whoever, men say, asserts a paradoxical proposition, has the burden of proof. But equally, they say, whoever supports his paradoxical proposition by sufficient evidence to make it probable, shifts the burden of proof, and now his adversary has it upon him¹. (2.) This is also a common legal usage.¹ (3.) It is a very comprehensive sense, for it includes not merely the duty of meeting a *prima facie* case against you, but also that of meeting a presumption, and that of going forward at the beginning. This last may be fixed upon the plaintiff by a mere rule of practice, as in Massachusetts,² irrespective of his true place in the procedure; or by the same considerations which determine whether a case is affirmative or negative; but, however fixed, the duty itself is in its nature merely the duty of going forward with the argument or the evidence, a duty wholly separable from that of finally establishing.

¹ See *andc*, p. 49.

² *Dorr v. Bank*, 128 Mass. p. 358; *Page v. Osgood*, 2 Gray, 260.

(b.) In favor of the other meaning it may be said (1) that it is the one which is prominent in the Roman law and in countries which have the Roman system of pleading; and (2) that for this exclusive sense there is a certain body of legal authority, e. g., that it has been formerly adopted as the only proper usage by one of our best courts, the Supreme Court of Massachusetts, and, in particular opinions, has been approved by other tribunals and judges.¹ But (1) as to its use in the Roman system, although it would be desirable to harmonize our use of the term *onus probandi* with theirs, that cannot well take place so long as our conceptions, our methods of legal procedure, and the questions which enter into our legal discussions are so unlike theirs.² It may be observed also that the immediate intuitus of the phrase, as used in that system, was rather to the duty, at the beginning, of going forward with evidence, than to the duty at the end, of holding the case made out; these two things, as I have said, are quite separable. According to the Roman conception he who had furnished evidence at the outset had furnished *probatio*. If counter evidence were offered, he must, indeed, keep up his *probatio*; but the notion of *probare* and *probatio* was answered by a *prima facie* case. (2) As regards the fact, that there is high authority for fixing upon the phrase the single meaning of a burden of establishing, it may be doubted whether experience favors a continuance of this experiment. Chief Justice Shaw began it in 1832,³ and not, as I venture to think, with a sufficient recognition of the fact that the other use of the phrase was also perfectly well fixed in legal usage. During the following twenty-eight years of his most valuable judicial life, he was able to hold the terminology of his court with fair success to the new rule, and to establish it in that State. But the example of this strictness has not, I believe, been followed. The discrimination thus boldly marked has been recognized often in other courts, and this meaning allowed and even preferred, or suggested as the only proper one, in particular opinions; but, so far as I know, no other court has undertaken to distinctly and steadily reject the other meaning.

Let me illustrate the difficulties that have attended the Massachusetts experiment. In 1840⁴ Chief Justice Shaw restates his view, and calls the other use of the word "a common misapprehension of

¹ See *ante*, p. 50.

² *Powers v. Russell*, 13 Pick. 69, 76.

³ See *ante*, pp. 46, 55.

⁴ *Sperry v. Wilcox*, 1 Met. 267.

the law on the subject." But in 1842¹ the opinion of the court distinctly lays down the other doctrine: "The [auditor's] report being made evidence by the statute, it necessarily shifted the burden of proof; for being *prima facie* evidence, it becomes conclusive where it is not contradicted or controlled." In 1844 (*Taunton Iron Co. v. Richmond*, 8 Met. 434) the reporter, afterwards Mr. Justice Metcalf, gives a decision of the court (*Shaw, C. J.*) that an auditor's report is *prima facie* evidence for the party in whose favor it is made, and adds in his head-note the expression, "and changes the burden of proof." In 1848² the court (Metcalf, J.) state that, in a suit by the payee of a promissory note against the maker, "the burden of proof is on the maker" to establish want of consideration. But two years later,³ they say that the burden of proof is on the plaintiff, and remark (*Fletcher, J.*) of the previous case that "there is a sentence in this opinion which may be misunderstood; . . . [quoting it]. This must be understood to mean that the burden of proof is on the maker to rebut the *prima facie* case made by producing the note, otherwise the *prima facie* evidence will be conclusive." In this same year, 1850,⁴ the court (Metcalf, J.), while distinguishing, in the case of an alteration in a writing, between "the burden of proof" and the "burden of explanation," define the burden of proof in terms borrowed from Baron Parke, but not understood by him or in English legal usage to be limited to the duty of establishing:⁵ "The effect . . . would be that if no evidence is given by a party claiming under such an instrument, the issue must always be found against him; this being the meaning of the 'burden of proof.' *1 Curteis, 640.*" In 1858⁶ the court (Dewey, J.) remark upon the fact that the Chief Justice of the lower court had used the phrase in another than "the more precisely accurate use of the term . . . as now held by the court," but they conclude that it did not mislead the jury. In 1859⁷ the judge below ruled

¹ *Jones v. Stevens*, 5 Met. 373, 378, Hubbard, J.

² *Jennison v. Stafford*, 1 *Cush.* 168.

³ *Delano v. Bartlett*, 6 *Cush.* 364, 368. It may well be doubted whether this case rests upon the true analysis of the substantive law; but it is still followed in Massachusetts, e. g., in *Perley v. Perley*, 144 Mass. 104 (1887), and, to some extent, elsewhere.

⁴ *Wilde v. Armsby*, 6 *Cush.* 314, 319.

⁵ See *ante*, p. 53.

⁶ *Noxon v. DeWolf*, 10 *Gray*, 343, 348.

⁷ *Morgan v. Morse*, 13 *Gray*, 150.

that "the burden of proof was upon the defendant to . . . control the auditor's report," and the court (Bigelow, J.) is obliged again to set forth the discrimination between "the technical sense" of the burden of proof and the other; and then follows what looks like a confession that their exclusive use of the word had not gained any firm hold in the seven and twenty years since Judge Shaw had begun it. "This mode of using the phrase, though somewhat loose and inaccurate, *is quite common*, and where not improperly applied to a case, so as to confuse or mislead the jury, cannot be held to be a misdirection."¹

Considering, therefore, that the widest legal usage, both in England and here, applies the term "burden of proof" in a sense which is satisfied by making out a *prima facie* case; that this sense covers the greater variety of situations, viz., not merely the case of one who has a *prima facie* case, or a presumption against him, but also that of him upon whom rests the duty of going forward with evidence at the beginning; and that it corresponds with the use of the phrase in ordinary discourse,—it would seem wise to fix upon it this meaning only, and to employ for the duty of making out a given proposition, some term, like that, already widely used, of the burden of establishing; in other words, to adopt the meaning which is so carefully stated by the Lord Justice Bowen in *Abrath v. North-Eastern Railway Co.*²

V. Whereabout in the law shall we place the subject of the burden of proof? It is common in our system to treat of it, when treated at all, in books on evidence; and the result is that it is little discussed, for it does not belong there.³ It belongs, as the law of evidence does, to the auxiliary, secondary, "adjective" part of the law; but it is by no means limited to the situation

¹ The opinion goes on: "In this sense it was manifestly used in this case. The attention of the court was not called to the distinction between that evidence which was sufficient to impeach and overcome a *prima facie* case, and that which was necessary to sustain the issue on the part of the plaintiff. . . . It would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict, unless it was impeached and controlled by the evidence offered by the defendant. But we see no reason to believe that the instruction given was not properly understood, or that the defendant was in any way aggrieved thereby." See also the difficult exposition in *Wilder v. Cowles*, 100 Mass. 487 (1868).

² See *ante*, p. 49.

³ Bentham, Works, vi. 214. "This topic [the *onus probandi*] . . . seems to be long rather to Procedure than to Evidence."

where parties are putting in "evidence"; it applies equally where the "evidence" is all in. It covers the topic of argument, of legal reasoning; and equally of reasoning about law and about fact; while the law of evidence relates merely to matter of fact offered to a judicial tribunal as the basis of inference to another matter of fact. To undertake to crowd within the limits proper to the law of evidence the considerations necessary for the determination of matters of a far wider scope, like those questions of logic and general experience and substantive law involved in the subjects of Presumption and Judicial Notice,¹ and that compound of considerations of the same character, coupled with others relating to the history and technicalities of pleading and mere forensic procedure, which lie at the bottom of what is called by this name of the "Burden of Proof,"—to attempt this is to burst the sides of the smaller subject and to bring obscurity over the whole of it. And, moreover, it is to condemn this topic, so important in the daily conduct of legal affairs, and so much needing a clear exposition, to a continuance of that neglect, and that slight and merely incidental treatment which it has so long suffered.

James B. Thayer.

CAMBRIDGE, May, 1890.

ELEVATED ROAD LITIGATION.

THE case of *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122, presented to the court of last resort in the State of New York a problem in the decision of which was involved a larger amount of property rights than ever came before an American tribunal, unless, perhaps, in the telephone cases. And the case also teemed with as many interesting, important, and varied legal questions as any one case could present. It was *sui generis* and novel in the matters in controversy. It was twice argued by the flower of the New York bar. It considered and laid down what are the rights in the highways that abutters on public streets possess. It determined what is and what is not a legitimate and

¹ 3 Harv. Law Rev. 141; ib. 285.

ordinary use of the public highways. It passed upon grave questions of the right of the legislative power to delegate to corporations the right of acquiring property by eminent domain. And, owing to the unusual circumstances under which the elevated roads in New York City were constructed and put into operation, there followed from the decision as a necessary consequence some of the prettiest questions as to the measure of damages and as to the possessor of those damages that a court is often called to pass upon.

The action was brought to restrain the defendant from the construction of an elevated railroad in front of the plaintiff's warehouses on Front street in New York City. It was found by the court below that the railroad would obscure to a limited extent the light in the plaintiff's building, and render the same flickering and less useful for business purposes, and would tend to depreciate the usefulness and value of the premises. But it was also found that the acts of the defendants were authorized by the Mayor and Commonalty of the city of New York, and were lawful.¹

In the Court of Appeals the judgment was reversed and an injunction decreed against the defendant, not to issue, however, until it had a reasonable opportunity to acquire the plaintiff's property by condemnation proceedings. What was the property which the court found the plaintiff had that the defendant would appropriate, and on what ground did the court find the plaintiff to possess such property? It was proven that the land where the plaintiff's building was, had originally belonged to the city of New York, and had been conveyed by the city to Mr. Story's predecessor in title in 1773. The court did not decide whether or not the language in the deed conveyed the fee to the centre of the street. But they determined that whether the plaintiff owned the fee or not, yet there was a covenant created by the language of the deed that the street should be forever maintained as a public street. The deed contained a covenant on the part of grantees to build and erect at their own expense certain streets, and among others the one in question, "which said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same,

¹ See case below, reported in 3 Abbot's N. C. 78.

in like manner as the other streets of the same city now are, or lawfully ought to be."

Having come to the conclusion that there was this covenant on the part of the city, they had next to determine whether the proposed elevated railroad and the operation of trains thereon was a usage of the street contrary to this covenant, or whether it was a use which the municipality could lawfully appropriate public streets for, from which usage any damages the plaintiff might suffer were but incidental damages such as property owners often suffer without entitling them to legal relief. They came to the conclusion that an elevated structure such as the one proposed was not a usage of the street which could be granted without making compensation.

There were two lines of their own decisions before them when the Story case was determined which, if not inconsistent, at least presented a sharp divergence as to what changes in the use of a street took away property from an abutter so as to entitle him to compensation.

On the one side were their own decisions in the surface railroad cases holding a street railway a legitimate street use;¹ on the other side were their decisions that such easements as the defendant sought to appropriate were property.²

The decision was rendered by a vote of four to three. The opinions of Danforth and Tracy, JJ., held in effect that light, air, and access to one's property from the street on which it abuts were property, and property that had been paid for presumably when the abutter purchased his property, and that because this court had held that a street surface railway was a legitimate use of the street, it was no way inconsistent to hold that a radically differently operated railway was not an ordinary and legitimate street use. The opinion of Earl, J., for the minority was in substance that an elevated railroad duly authorized for the necessities of the people of the city of New York was just as much a use of the street that was now proper as was a street surface railway at the time the prior decisions were rendered, and that an elevated railroad could not be held an unlawful street use without overruling their own prior decision in the surface railway cases.

¹ *People v. Kerr*, 27 N.Y. 188; *Kellinger v. Forty-second Street Railway*, 50 N.Y. 206.

² *Arnold v. Hudson River Railroad Company*, 55 N.Y. 661; *Doyle v. Lord*, 64 N.Y.

It would be perhaps presumptuous in the writer to enter into any discussion as to which opinion was correct law, after the able presentation of each question by the respective advocates and judges. But I think every one must admit that the conclusion reached by the majority of the court was consonant with every natural sense of justice. No one can really suppose that such an appropriation of the streets as was made in 53d street or Pearl street, New York City, was ever contemplated or dreamed of by either the municipality or the abutting property owners when these streets were laid out. And whatever view may be held as to the effect of the elevated railroads on value in some streets in New York City, on these streets there can be no question a serious injury was done to property by the construction of elevated railroads. Nor does the court seem to have violated the principle of *stare decisis* in reaching the conclusions it did. Tracy, J., very satisfactorily says, "The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses." There is no similarity between a surface horse railway and an elevated road. And it would indeed have been a startling suggestion if the court had held that any use of a public street which might be convenient for the use of the people of the city could legally be authorized by the Legislature. To the writer it has always seemed that the decision in *Story v. N. Y. Elevated Railroad Company* was a most desirable conclusion—all the more worthy of praise because of the clamor with which the argument was pressed of the great benefit conferred upon the city of New York by these elevated roads.

The decision in the *Story* case, carefully considered as it was, and clear and satisfactory as it would seem to be in the principle it laid down, was not to be permitted to stand without a desperate attempt to reconsider and overrule it, or at least to limit its effect within a very narrow compass. It remained for the court in the case of *Lahr v. Metropolitan*, 104 N. Y. 268, to reiterate the doctrine of the *Story* case in even more decided language. In this second case it was argued by the defendant that the doctrine of the *Story* case only applied to cases where there existed the peculiar covenant in the deed. And had this view prevailed it would have resulted in putting an end to the great mass of the elevated litigation. A large proportion of the territory over which

the elevated roads of the city extend is in streets where a qualified fee of the street is conferred or vested in the city without any specific covenant in a conveyance from the city as in the Story case. The language of the Act of 1813, under which most of the streets in the city were opened and laid out, is as follows: "In trust, nevertheless, that the same be appropriated and kept open for a part of a public street . . . forever in like manner as the other public streets . . . in the said city are and of right ought to be." But in the Lahr case the court, after assuming as their rule of conduct the principle of the Story decision, said that wherever the opinion in the Story case led they felt bound to go, and held that under these street-opening acts there was just as definite a trust created on the part of the city as in the case of a covenant like that in the Story case, and that the abutting owners being liable to assessment for street purposes it would be little short of "legalized robbery" if these benefits could at the next moment be taken from them.

There remained still one more resource for the elevated railroad companies to deny their liability. There were a few streets on the line of their road, where there was not a covenant from the city, as in the Story case, nor were they opened under the act of 1813, as in the Lahr case. (Pearl street and the Bowery are examples.) It has always been contended that in these "Dutch brief" cases at least there is no liability to the property owner.

The argument to support this contention is based upon the theory that these streets were originally Dutch highways, and subject to Dutch law; that by the law of the Dutch the municipality owned the fee of the streets subject to no trust in favor of the abutting property owners; and that when the English succeeded to the control of Manhattan Island in these streets the rule of the Dutch law prevailed. The case of *Dunham v. Williams*¹ is the chief case relied upon as an authority for this position. That was a case holding that where a highway was laid out prior to the capitulation of the Dutch, the title of the government to it became absolute, as that was the rule of the civil law, and the Dutch made it a condition of their surrender that they should remain in the enjoyment of their own customs as to inheritance.

The argument has been repudiated by the Supreme Court of New York, by the Superior Court of the City of New York, and

¹ 37 N. Y. 251.

by the Court of Common Pleas for the City and County of New York.¹ All these courts have interpreted the Lahr case as laying down the broad doctrine that every abutter on a public street as such is possessed of certain easements in the street, which are property which cannot be taken from him without compensation. But the leading case on the Dutch brief question is that of Abendroth *v.* N. Y. Elev., reported in 54 Superior, 417, and now argued, but not, at the time of writing, decided by the Court of Appeals. There would seem, however, to be little doubt that the case will be affirmed, and the Dutch brief question determined against the railroad companies by our Court of Last Resort. The whole theory of these elevated road cases as hitherto expounded by that court has been that abutters on public streets have, *as such abutters*, certain property in the streets which they cannot be deprived of without compensation. This property has been deduced from their liability to be assessed for street openings and improvements (see language of Ruger, C. J., in Lahr case, *ubi supra*). That liability is just as coextensive on Pearl street as on any other street in New York City. And whoever may own the fee of the streets and whatever law may have prevailed there, yet while they do exist as public streets, it would be an artificial and illogical position to interpret the right of property owners upon them as differing from those on any other street in the city. It is to be expected that the decision of the Court of Appeals in the Abendroth case will settle forever the rule that every abutter on any public street has property rights in the streets of which he cannot be deprived without compensation.

We have been considering hitherto what rights of property have been found to exist in abutters on public streets ; a no less mooted question has been in many cases to whom that property belongs. The elevated roads were built and put in operation throughout the city in the years 1876 to 1879. It was not until 1882 that the Story case finally fixed a liability upon the companies. Meanwhile much property abutting on the line had been transferred, the grantors in some cases reserving "all causes of action whether in law or in equity against the elevated railroads for loss of rents or depreciation of value of the property," but commonly conveying without any reservation.

¹ See Hine *v.* N. Y. Elev., 27 N. Y. St. R. 303 ; Mortimer *v.* N. Y. Elev., 25 N. Y. St. R. 872 ; and Kane *v.* N. Y. Elev. R. R., 6 N. Y. Weekly Supplement 526.

Let us consider first the ordinary case where real estate is transferred without any reservation. Every layman and many of the bar, not familiar with the course of this litigation, have asserted that the damages belong to the person who owned at the time the roads were built. His grantee purchased the property at a reduced price from the very fact of the road being there, and it has been argued with much apparent plausibility by the railroads that the seller is entitled to the damages. There is a great deal of abstract justice in this argument, but the law has been interpreted otherwise,—*Glover v. Manhattan*,¹ where Ingraham, J., says: “It can make no difference at what time he became the owner of the property, but he is entitled to be protected against an unauthorized appropriation, whether it was acquired by him before the defendants appropriated it, or the day before the commencement of the action.”

The writer has always thought a different rule would have been much more in harmony with justice. Yet the decision in New York State could not have been otherwise without unsettling the law of realty, and doing much more injury by making poor law to meet an exceptional hardship. In many States these roads would have been held to have committed a permanent trespass, and the cause of action to have accrued when they were built. But in New York the whole tendency is to regard such trespasses as continuing, every day constituting a new trespass and a new cause of action.²

It is partly on this ground that the defence of laches has been so continually overruled by the courts in the equity action.

In a suit at law a property owner cannot recover the permanent damage to his property. He can only recover the damages that have accrued for the six years of trespasses prior to instituting the action, provided he has owned the property for six years.³ The practical way in which property owners have obtained full damages past, present, and future has been by maintaining an action in equity to enjoin the operating of the road. Another reason why a court of equity will take jurisdiction is to avoid a multiplicity of suits. The courts decree an injunction and award the property owner as *incidental relief* the rental damage that he has

¹ 51 Superior Ct. 1.

² *Uline v. N. Y. Cent. R. R. Co.*, 101 N. Y. 98; *Pond v. Met. Elev. Ry. Co.*, 112 N. Y. 186.

³ *Pond v. Metropolitan*, *supra*.

suffered to the date of the trial accruing within six years prior to the commencement of the action. But an optional clause is invariably inserted in the decree of injunction somewhat in this form :—

That upon tender to plaintiff within thirty days from the date of this judgment of the sum of \$10,000 for the easements in South Fifth Avenue, appurtenant to the premises described in the complaint, plaintiff deliver or cause to be delivered to the defendant a conveyance and release from himself conveying and releasing to the defendant the right to use the street for the defendant's present structure and the operation of defendant's railroad as at present operated and maintained, and in the event that said money is so tendered to the plaintiff no injunction shall issue herein.

In this neat method a court of equity has been able to dispose of the whole litigation at once, and as matter of fact to award full damage. But this alternative clause has always been regarded as a favor to the defendants to enable them to avoid the injunction. Should they see fit to submit to the injunction they could do so.¹

Hence, when property is conveyed absolutely, the purchaser taking all the right attaching to property is not to be prevented from enforcing his rights simply because he paid no more than the property was worth with the road there. The seller having parted with the fee, of course cannot enjoin trespasses on property he has ceased to own, and as the Pond case shuts him out from maintaining an action at law to recover the permanent damage, he can only recover for the trespasses during his ownership accruing within six years prior to the commencement of his law action.

Although the law is not quite so definitely settled in the first case where he has reserved all cause of action the same rule doubtless will prevail. One cannot reserve a cause of action to accrue in the future. And a reservation of the easements would be in derogation of his deed, as they are of no value detached from the land to which they are incident. So that practically such a reservation is of no avail to benefit the seller.

We pass now to the question of damages. In the Lahr case² the court said :—

¹ Eno v. Metropolitan, 56 Superior, 313.

² 104 N. Y. 268.

The structure here and the intended use cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produces upon the property of the abutter.

However the damages may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts.

The Drucker case¹ illustrated the application of this rule:—

Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage even though the necessary concomitants of the construction and operation of the road and not the product of negligence, for they abridge the land-owners' easements and to that extent, at least, are subjects for redress in an action for damages.

Whether noise from the operation of the road is a proper element of damage is still a question not passed upon definitely by the Court of Appeals. In *Taylor v. Met.*² and in *Kane v. Metropolitan*³ noise has been held a proper element of damage.

The argument against recovery for noise is that an abutting owner has no easement of quiet in the street. The argument in favor of allowing it has been the language in the Lahr opinion and the general argument that such a noise is not an ordinary street use. Similarly, whether "loss of privacy" is an element of damage is still an open question. It is argued on the one side that a property owner certainly has no easement of seclusion on the street, or, as one eminent counsel for the road expressed it, persons might walk on tall stilts past one's premises, yet they would not be held liable; on the other side it is argued that any use of a street which exposes the occupants of property to unusual gaze and inspection from the public is not an ordinary street use, and hence is a use to which the street cannot be subjected without compensation.

We pass now to the question as to whom the past damages belong in the case of a leased estate. As we have seen, at law a property owner can recover the damages for the past trespasses committed within six years prior to the commencement of the

¹ 106 N. Y. 157.

² 55 N. Y. Superior Ct. 555.

³ N. Y. Weekly Supplement, 526.

action, or if he has not owned for six years previous to the time of instituting a suit, then he can recover for the trespasses committed between the time of his acquiring title and the beginning of the action.

In equity we have also seen the court will, as incidental relief to the remedy of an injunction, award past damages accruing within six years prior to the commencement of the action down *to the date of the trial.*¹ Suppose, however, that a little more than six years before beginning an action a property owner leases property, say for five years. Is he entitled to recover damages accruing during the pendency of the lease? It has been plausibly argued that to him it was a matter of complete indifference whether during this lease the road is in operation or not, that the cessation of the road would not make his rent a bit higher until his lease expired. It has also been argued that as long as the premises are in possession of a tenant, the landlord is not entitled to the possession and is not the proper person to sue for a trespass.

The first argument seems clearly fallacious. It proceeds on the assumption that the cause of action accrued more than six years before the action was commenced, and hence is barred under the Statute of Limitations. The truth is that the cause of action that accrued within six years was anticipated as likely to occur more than six years ago, so that it is only the anticipation that is barred, not the cause of action which was for trespasses committed within six years, although foreseen as likely more than six years previously, because they were a continuing trespass that had already been existing several years before the lease was made. And it was the fact of the certainty of these trespasses being committed these six years that fixed the rate of rent, not the fact they had been previously committed. The second argument is, however, a more serious one. Was the landlord the proper party to recover at all for the past trespasses? Ordinarily, when premises are in the possession of a tenant, the tenant, not the landlord, is the proper plaintiff to sue for a trespass to the realty, unless it be one affecting the inheritance. So that while the landlord could maintain an action in equity on the ground of restraining an injury to the inheritance, he could not recover the past damages. The Superior

¹ *Glover v. Manhattan*, 51 N. Y. Superior Ct., at p. 18.

Court in a second Mortimer case¹ have allowed a recovery of past damages by the landlord on the ingenious theory that the tenant is not in possession of these easements, because the landlord only leased to him what he himself was in possession of. A truer ground, if it could be reached without violating established principles, would be to award the damages to the landlord, because he, not the tenant, suffered them.

We come now to the question, of what date shall the damage be assessed,—a very important inquiry in view of the policy pursued by the management of the roads in New York City. If lots were vacant in 1878, when the elevated roads were put in operation, but now support costly structures, it is obvious the damage to-day may be much greater than it was in 1878. Of which date is it to be assessed? Can a person deliberately erect a building on a vacant lot, with an elevated road running by the lot, and then compel the court to include in the estimate of damages the injury to the building as well as to the lot? In many cases this difficulty is a more apparent than real one, for the real damage is the injury to the use of the lot, which perhaps would only be evidenced by the injury to the lot with a building upon it. In other words, the estimate of damages would be the same in either event. Still, there might be and are some cases where, as a vacant lot, the land was worth, say, \$50,000 before the road, and would be worth \$40,000 as a vacant lot to-day. Assuming there would have been no change in selling value but for the railroad, the damage to a vacant lot would be \$10,000. We now take the same lot and put a building upon it; to-day it is worth \$75,000. We prove that an identical building, on a parallel street, where lots were just as valuable as in the street in question before the road was built, is now selling for \$95,000; that our building, were no road there, would presumably be worth \$95,000 also. Is not the damage to our lot and building \$20,000 now? In other words, can a property owner improve his land and then charge the trespasser with it? The case of *Campbell v. Seaman*² was the chief authority relied on by the property owner's counsel in the case of *Kenkele v. Manhattan Railway Company*.³ The Kenkele case laid down the law to be that the damages must be assessed as of the time of the

¹ 29 N. Y. St. R. 262.

² 63 N. Y. 568.

³ 29 N. Y. State Reporter, 95.

trial, that the roads being trespasses could not invoke the rule of damages they might have had the benefit of had they acquired the property when they built their road. If this Kenkele case be affirmed at the Court of Appeals, it must result in compelling the railroads to pay an increased compensation for all the lots recently built on along their line in the upper part of Manhattan island. In the Kenkele case the court say that the sole question is what enhanced value these easements would give to the property to-day, for apart from the property to which they attach they are worthless.

In Tallman *v.* Metropolitan, decided by the Court of Appeals, April 15, 1890, it was held that a property owner has the right to make any reasonable use of his land, when not acting "wantonly," and can recover the damage done to his land *in the use to which it is put*, but that he cannot recover past damages to vacant lots, assessed on the theory that but for the road having come there he would have built upon them.

We have considered for what kind of damages a recovery may be had, who is entitled to the damages, and of what date they are to be assessed. There remains the single question, how to prove them. The building of the elevated roads in New York City shifted somewhat real-estate values. Add to the uncertainty in our problem the natural increase in values in some portions of the city from extraneous causes, and we find it a complicated problem to attain justice to all parties. Two late decisions of the Court of Appeals have introduced another disturbing feature.

In McGean *v.* Manhattan Railway Company¹ there is a dictum that testimony as to what the property would be worth to-day without the elevated road is incompetent if properly objected to, although in that particular case the judgment was not reversed, because it was held that there was abundant competent testimony to sustain the verdict of the jury. And yet that question was the very one the court or jury had to decide. Where property has had a rental value for years, it may be possible to get at the permanent damage to the fee without such testimony; but how are we to get any testimony that is not open to this objection when property has been improved since the road came? As the Kenkele opinion (*supra*) says, unless such testimony is competent

¹ 27 N. Y. State Reporter, 337.

the whole matter would be merely guess-work, and the plaintiff left without any means of proving his damage.

In the case of *Newman v. Metropolitan Elevated Railway Co.*, decided by the second division of the Court of Appeals, March 4, 1890,¹ it was ruled that the defendants were entitled to offset against the damage any special benefit conferred upon the property in question by the maintenance of the road, the location of its stations, etc. A reference to the General Railroad Act of the State² and to the "Rapid Transit Act"³ will show that they contain this provision, that Commissioners of Appraisal in fixing compensation shall not "make any allowance or deduction on account of any real or supposed benefit which the party in interest may derive from the construction of the proposed railway."

It is difficult to see how the decision in the *Newman* case is good law. The court rest their decision on the theory that it is for consequential damages that a recovery is permitted in most of these cases, and that it is only where property is actually taken that no offset of benefit is allowed. But the very idea at the bottom of all the elevated decisions in that court was that property had been taken. It is difficult to perceive why the second division have not overruled the first, or else shifted the ground of liability.

The *Newman* opinion also says that general benefits due to public improvements and the construction of railroads are not such as the companies are entitled to offset, and that the property owner is entitled to them.

The true rule of damages is certainly the difference between the value of the property without the road taking these easements and its value with them taken. If the rents have depreciated so much per year, and the court is of the conclusion that the decrease is attributable to the trespasses of the railroads, we have one method of reaching the fee damage by a proper capitalization. Suppose they have increased slightly, does it follow that there still may be no depreciation occasioned by the road? Perhaps the two parallel streets on the east and west have increased 25% more. May not the two increases be a direct benefit occasioned by the road itself, and can a property owner complain because his property has not

¹ Probably 118 N. Y.

² Chapter 140 of the Laws of 1850.

³ Chapter 606 of the Laws of 1875.

been benefited as much as other streets by these roads? Can the roads claim that property has not been damaged by them, though it may sell for its old figure, when all the neighborhood east and west, north and south, has shown a much higher increase? Does not a restriction on the use of property necessarily entail some damage? Is it a fair criterion to say that a sale for \$23,000 in an inflated currency in 1873 is higher than a sale for \$20,000 in currency on a gold basis in 1890? All these interesting questions I will only hint at as showing what a field of inquiry we have now touched. They are still unsettled questions which I do not feel justified in more than alluding to.

This very hasty glance at the elevated railroad litigation in New York will have served the writer's purpose, if it has helped in any way to show that, no matter how novel may be a legal problem, and no matter how great may be the interest involved, as long as the United States possess honest courts and a well-trained bar there will be found a way to meet all new problems and to reach satisfactory results; a way to promote public enterprise without injuring the individual citizen. This is the real benefit of the Story decision. This is the real lesson that it teaches. These are the two golden rules of jurisprudence it enunciated: First, "*Sic utere tuo ut alienum non laedas;*" and the second is like unto it, "Private property shall not be taken for public purposes without compensation."

Edward A. Hibbard.

NEW YORK, April, 1890.

TAXATION OF PIPES IN PUBLIC STREETS.

A N interesting question of law, and one upon which the courts are in hopeless disagreement, arises when a tax is levied upon iron pipes laid by private parties in the public streets by permission of the local authorities. Common examples of such pipes are gas and water mains laid by private corporations.

The fundamental inquiry is as to the nature of the interest of the corporation in the mains after they have been laid. Four theories have been held by the courts.

I. In Tennessee it is held that the pipes remain the personal property of the company.¹

II. In Iowa it is held that they are affixed to the land on which the main works or sources of supply are situated, and are taxable as real estate of the company in the town where that land lies, though they may run into another town.²

III. In Rhode Island it is held that they are affixed to an easement which the company possesses in the soil of the street, and are therefore real estate of the company where they lie.³ They are taxed, then, not *as an easement* of such value, but as actual tangible real estate owned by the company as appurtenant to its easement.

IV. In England it is held that they are affixed to the soil, and are, therefore, real estate; but that they are only occupied, not owned, by the company.⁴ This view is apparently held in New York also.⁵

To consider the less tenable views first, it seems clear that the theory of the Iowa court cannot be sustained; though it is supported, it is said, by the practice of the assessors in at least one other Western State. It seems to have at least three fatal flaws. First, it is opposed to the facts. The water-mains in that case were no more affixed to the water-works than to the street-hydrants or to the land of consumers; as, for instance, a bridge is equally affixed to each bank of the river. Secondly, it is opposed to every other decided case in which the subject is considered. Thirdly, it is opposed to common sense.

The Rhode Island case is based on a phrase of Lord Campbell in his decision in the Chelsea water-works case, so far as it is

¹ *Memphis Gas-Light Co. v. The State*, 6 Coldw. 310.

² *Appeal of The Des Moines Water Co.*, 48 Ia. 324.

³ *Providence Gas Co. v. Thurber*, 2 R. I. 15.

⁴ Compare *King v. Brighton Gas-Light Co.*, 5 B. & C. 466, with *Chelsea Water-works Co. v. Bowley*, 17 Q. B. 358. In the former case the company was held to be an *occupier* of land in the parish through which its pipes ran, and, therefore, to be liable to the poor-rate. In the latter case the company was held to have no *interest* (*i. e.*, ownership) in the land through which the pipes ran, and, therefore, not to be liable to the land-tax. In the former case it was distinctly held that the pipes were not personal property, but were affixed to the soil; the contrary having been urged by the company's counsel. The effect of these two cases is, therefore, as stated in the text.

⁵ *People v. Assessors of Brooklyn*, 39 N. Y. 81. The decision is, that the pipes were not affixed to any land of the company, and, therefore, not taxable to it as real estate *belonging to it*. The court seems to take it for granted that the pipes were real estate.

based on any authority ; and this phrase really lends no aid to the Rhode Island decision. It is a novel idea, that a chattel can be so affixed to an easement as to become the real property of the owner of the easement. If, for instance, the owner of a right of way should affix stone steps to the land, would they not pass to the owner of the land ? Could they be claimed as affixed to the right of way ? There are other objections to the Rhode Island theory, but this seems conclusive.

It remains to consider whether the pipes are personal property. It seems to me that they clearly are not, and that the English and New York theory is preferable to that of Tennessee. The pipes are put in the ground to remain there, or to be removed only when they become worn out and it is necessary to replace them with other pipes. Suppose the licence of the company to use the streets were revoked, the company would clearly have no right, after that, to dig up its pipes. This is, to be sure, consistent with continued ownership by the company ; but intention settles the question whether or not they become part of the realty, and the fact that the company can remove its pipes only with the concurrence of the authorities is important as indicating a probable intention that they shall remain in the soil.

In fact, when a worn-out pipe is replaced by a new one, the old iron is carried away by the company. But this is consistent with the theory that the pipe is part of the realty. Suppose a tenant chooses to repair a brick walk on the leased premises, putting in new bricks ; would he not be entitled to the old ones ? Could the landlord bring trover if he destroyed them ? Much more should it be so here. The company having a right to do so enters the land and severs certain old iron from the soil ; the iron becomes a new article of property, and may well go to the company.

Suppose, instead of laying pipes through the streets, a gas or water company should dig a tunnel, cementing the sides of it to prevent leakage. There can be no doubt that the cement would become part of the realty. Is there any difference when iron is used in place of cement for the same purpose ? As iron pipe is it not *functus officio*, having become the wall of a tunnel, to be removed, if at all, not as iron pipe but as old junk ?

This view, which is that of the English courts, seems to me the only one tenable. If it is correct, the remaining question is merely one of interpretation of the statute providing for taxation.

It is in the power of the Legislature to tax the company for the pipes. This may be done, as in New York, by a special provision making the pipes real estate of the company *for purposes of taxation*,¹ or as in Massachusetts, by taxing the value of the company's franchise, which is of course, in an indirect way, taxation of the pipes, since the value of the franchise includes the value of the pipes.² An expedient holding gas-pipes to be part of the machinery of manufacture³ is questionable in point of fact; if in fact they were part of the machinery of the company, they might well be taxed to it as such, though the legal ownership were in another.

In the absence, however, of a special provision of the statutes, pipes in the public street should be taxed neither as the real estate nor as the personal property of the company that lays them.

Joseph H. Beale, Jr.

BOSTON, January, 1890.

¹ Laws of 1881, c. 293.

² Dudley *v.* Jamaica Plain Aqueduct Corporation, 100 Mass. 183.

³ Com. *v.* Lowell Gas-Light Co., 12 All. 75; Memphis Gas-Light Co. *v.* The State, 6 Coldw. 310.

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THE NEXT NUMBER OF THE REVIEW WILL APPEAR IN OCTOBER.

The appointment of the Hon. Jeremiah Smith to the Story professorship must be a cause of satisfaction to all friends of the Law School. Judge Smith comes of an old and well-known New England family ; his father, who was Chief Justice and Governor of New Hampshire, and the intimate friend of such men as Fisher Ames and Daniel Webster, was one of the most distinguished men in the history of his State. Judge Smith was born in 1837, graduated at Harvard College in the Class of 1856, and then studied law, spending a year at the Harvard Law School. In 1867, at the age of thirty, and only six years after leaving the Law School, he was appointed a justice of the Supreme Court of New Hampshire. This position he resigned in 1874 on account of ill-health, and he has since practiced law at Dover. He has been a member of the examining committee for admission to the New Hampshire bar, and has lately published for the use of students an admirable list of cases selected from the reports of that State. Judge Smith's very interesting address on the legal profession, recently delivered at the college conference, is fresh in the recollection of all who heard it.

MR. SAMUEL WILLISTON has been appointed Assistant Professor at the Law School. Mr. Williston graduated at Harvard College in 1882 and at the Law School in 1888. In that year he won the Harvard Law School Association prize by an essay on the "History of the Law of Business Corporations before 1800,"¹ and on graduation he was chosen to represent his class in the Commencement exercises. He was private secretary to Mr. Justice Gray, of the United States Supreme Court, in the following year, and since then he has practised law in Boston in connection with the firm of Hyde, Dickinson, and Howe.

A COURSE of lectures on the Law of Damages, by Mr. Joseph Henry Beale, a graduate of Harvard in 1882 and of the Law School 1887, is also announced for next year. Mr. Beale has been for some time assisting in the preparation of a new edition of Sedgwick's *Measure of Damages*, and is the author of an article on "Tickets" in *HARVARD LAW REVIEW*, 17, which has attracted much attention.

This essay may be found in *2 Harv. L. Rev.* 105, 149.

THE Council of the Harvard Law School Association submits the following report of membership on May 1, 1890. The Association now numbers 1,361 members (an increase of 398 members since January 1, 1890), representing forty-two States and Territories, and distributed as follows :—

Alabama,	5	Maryland,	16	Tennessee,	5
Arkansas,	3	Massachusetts,	577	Texas,	8
California,	35	Michigan,	15	Utah,	3
Colorado,	13	Minnesota,	19	Vermont,	4
Connecticut,	14	Mississippi,	1	Virginia,	3
Dakota,	3	Missouri,	44	Washington,	5
Delaware,	9	Montana,	2	West Virginia,	4
Dist. Columbia,	24	Nebraska,	3	Wisconsin,	9
Florida,	1	New Hampshire,	16	New Brunswick,	21
Georgia,	7	New Jersey,	22	Nova Scotia,	9
Illinois,	60	New York,	179	British Columbia,	1
Indiana,	11	North Carolina,	2	U.S. of Columbia,	1
Iowa,	10	Ohio,	76	France,	1
Kansas,	2	Oregon,	4	Austria,	1
Kentucky,	16	Pennsylvania,	44	Japan,	2
Louisiana,	3	Rhode Island,	19		
Maine,	28	South Carolina,	1	Total,	1,361

Similar tables may be found in the REVIEW of April, 1888 (Vol. II. p. 43), and of December, 1889 (Vol. III. p. 226).

THE Law Quarterly Review¹ dismisses the case of *Reg. v. Collins* with the following rather contemptuous observations : “ That a man who puts his hand into your pocket *animofurandi* is not guilty of an attempt to steal if the pocket is empty, savours more of casuistry than common sense. Yet *Reg. v. Collins* (9 Cox, C. C. 497) so decided. The Court of Crown Cases Reserved is not ‘ satisfied ’ with this decision (*Queen v. Brown*, 24 Q. B. Div. 357). Probably no one is but Mr. Bill Sykes.” It may be suggested with great respect that the opinion of Mr. Justice Barrett in *People v. Moran*² contains arguments which have “ satisfied ” judges of some eminence, and which do not appear to have been answered in any reported case.

THE Jurist of last November contains a remarkable account of a Swedish trial, in which a medical student sued a doctor for hypnotizing him against his will. The defendant was enterprising enough to follow up his previous offence by hypnotizing all the plaintiff’s witnesses and making them contradict themselves and behave in a generally irrational manner ; and this course of action so bewildered the judge that instead of committing the defendant for contempt, a step which would seem to have been quite justifiable under the circumstances,—unless, perhaps, he feared to meet with the same fate as the witnesses,—he adjourned the case for the purpose of calling in medical assistance. The reader cannot but fear that some of the picturesqueness of this anecdote is attributable to the fact that it comes by way of “ one of the

¹ VI. 237.

² 54 Hun, 279; cited in 3 Harv. L. Rev. 375.

evening papers;" yet it is impossible to read Dr. James's interesting paper on the "Hidden Self" in the March "Scribner's" without reflecting on the part which hypnotism may yet play in the law. It is strange to think of our jury system and present judicial machinery applied to some of the many questions which the subject may raise, more especially in the criminal law; but up to the present time it does not seem to have come before the courts of this country.

In France, however, there have been such cases, an account of which, together with a very learned and valuable discussion of hypnotism in its legal aspects, will be found in a recent work of M. Jules Liégeois,¹ Professor of Jurisprudence at Nancy. This book is an elaborate treatment of the subject and contains facts of great importance to medical jurisprudence. The author believes that there are serious dangers in hypnotism with which the law may be called upon to deal, and he gives many striking experiments to show how the hypnotized person may be made the victim of fraud or crime, or may, by means of the post-hypnotic suggestion, be used as a tool in the hands of another.² In the latter case, M. Liégeois is of opinion that the law should regard the hypnotizer as the criminal, treating the subject as legally irresponsible.

Among the few occasions when the question has actually come up in court is a remarkable case some twenty-five years ago in which a beggar had enticed from her home, under very peculiar circumstances, the daughter of respectable French peasants. He was arrested, and the magistrate put to two doctors the question whether the accused "could by the influence of magnetic passes have destroyed her moral liberty to such an extent as to give his acts the character of rape." The doctors answered in the affirmative, and at the trial, which resulted in a conviction, other experts were called and testified before the jury to the same effect. M. Liégeois points out that the physicians seem to have imperfectly understood the nature of the "magnetism" of which they testified, but that the circumstances of the case were such as entirely to confirm the theory that the prisoner exercised a hypnotic influence over his victim. The facts of a more recent case, where the memory of a girl convicted of theft was awakened by hypnotism, and it was thus discovered that she had secreted the missing article while in a state of somnambulism, bear a strange resemblance to the main incident of Wilkie Collins's "Moonstone."

In a note appended to the report of a recent criminal case on appeal in one of the Southern States (*State v. Baker*, 10 S. E. Rep. 639), the presiding judge takes occasion to protest against the prevailing practice of incorporating into a bill of exceptions, whenever the evidence is brought into question, the stenographer's report of the proceedings in the lower court. It not only, the judge claims, renders the record vague and voluminous, and involves the State and individuals in much unnecessary expense, but it also throws upon the judges

¹ De la Suggestion et du Somnambulisme dans leurs Rapports avec la Jurisprudence et la Médecine Légale. Paris, Octave Doin 1889.

² In an article entitled "Hypnotism and Crime" in the April "Forum," Dr. Charcot, who belongs to a different school from M. Liégeois, states his belief that the danger of such a use of the hypnotic suggestion is much overrated; his views seem, however, to be connected with the peculiar doctrines of his school. A treatise on Hypnotism by Dr. Hjörnström, of Stockholm, recently translated for the Humboldt Library, also contains a readable, though rather thin, chapter on Hypnotism and the Law.

of the higher court a great deal of burdensome and needless labor. That there is reason in the complaint will be admitted when the length of the report of this same case, sent up in a bill of exceptions on the ground that the verdict was contrary to evidence, is stated. It covers eleven hundred and five large pages of print, of which nine hundred and fifteen pages relate to the evidence, and ninety to the examination of jurors, all in the form of questions and answers. With this volume before him, it cannot be wondered that the judge complains. The labor of "fishing up the evidence in fragments from such muddy waters," as a Georgia judge terms it, is no slight task, and consumes much time badly needed for public business. The judge urges that when the motion is for a new trial on the ground that the verdict is contrary to evidence, the bill of exceptions should certify the facts proved and give the entire evidence. He is undoubtedly right, and the only wonder is that the judges confine themselves to complaining, when it would seem as if they had the remedy in their own hands.

A VIVID picture of society in Mississippi before the war is presented in a recent book by Mr. Reuben Davis,¹ the sole survivor of the bar of Mississippi of fifty years ago. It was the Age of Chivalry, and the prosaic rules of the common law were not allowed to interfere with the rules of honor. The result is that many things in this book give our ideas of the majesty of the law a rude shock. Murder seems to have been regarded as rather laudable than otherwise. Mr. Davis resigned his position of District Attorney to avoid prosecuting his friends for killing their fellow-citizens. He defended over two hundred charged with murder, no one of whom was hung. Perhaps this spirit of leniency was fostered by the grand carousal in which the judge and jury participated, which followed an acquittal; but of course the great reason was that every one was expected to kill those with whom he quarrelled, and none would vote to hang another for doing what he himself would have done under the same circumstances. One marvels, however, that the district attorneys did not tire of indicting. Even in the presence of the court the haughty Southerner could with difficulty curb his fiery spirit. Mr. Davis, one of the most courteous, refined, and popular men in the State, tried to cut the throat of a judge for whom he had the highest respect, but whom he thought had fined him unjustly. In a case in which the passion of the spectators became aroused the position of the judge was precarious if his rulings displeased them. We read that a certain ruling as to the admissibility of evidence was received with a storm of indignation by the spectators. "Yells, curses, and even tears attested the fervor of their emotions. The court saw its danger and hastily recalled the witness." We must be careful, however, not to assume that justice was administered after the frontier style. Cases like the above were of course the rare exception. All the technicalities of the common-law pleading were in full force; the law, except in the case of homicide, was effectively administered, and we are assured that fraud and corruption of all kinds were detested.

¹ *Recollections of Mississippi and Mississippians.*

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

THE STATUTE OF FRAUDS, SECTION. 17.—(*From Professor Thayer's Lectures.*)—It has been said¹ that the Statute of Frauds was the result of “a case of frightful perjury;” but this is quite too trivial an explanation for so comprehensive and elaborate a piece of law reform. Probably it was an afterclap of the Commonwealth—a period full of ideas that went to the root of things, in law as well as in politics. This spirit survived the Restoration, and at the beginning of the reign of Charles II. committees were appointed to continue the endeavors after reform which had been carried forward in the time of the Commonwealth. Finch (Lord Nottingham) was on one of the committees, and these labors culminated in the Statute of Frauds. To the far-reaching propositions of legal reform made in the Commonwealth, and Sir Matthew Hale's connection with them, you may find a clue in a valuable paper in 3 Juridical Society Papers, 567, 597, and in 6 Somers's Tracts, 177-245. It is Hale and Nottingham who are generally credited with the chief hand in bringing out the Statute of Frauds.

We may fairly conjecture that the condition of the law at this time, as to proof of matters of fact, may well have had an important influence. In 1670, about six years before the statute, Bushell's case² had put an end to the old mode of restraining jurors by fines and imprisonment; and the attaint was no longer workable. Yet Bushell's case expressly recognized the old character of the jury as still existing, and allowed their rightful power to decide cases on their own knowledge without any evidence at all, and in disregard of any that might have been given. A method of checking jurors in the exercise of this power by granting new trials had indeed begun, but it was a novelty and was not worked out till later. This was, of course, a most unsatisfactory state of affairs, against which the statute appears to furnish protection, in a great variety of cases, by requiring a particular kind of pre-appointed form, not merely as a necessary kind of evidence to submit to a tribunal as their basis of inference, but as constituting a prerequisite ground of action, or, in some cases, an optional defence.

This exclusion, in certain cases of casual oral evidence and requirement of pre-constituted evidence in the shape of a writing, is the most conspicuous and characteristic feature of the Statute of Frauds. But it is by no means its only method or its only aim, as is shown by an examination of the whole instrument. Sections 10, 11, 12, 15, 16, 18 illustrate its wider scope. It is a various and most comprehensive piece of work.

There is an important and obvious difference between section 4 and section 17, in that the former is satisfied by a memorandum

¹ For instances see 4 Kent's Commentaries, 517; *Ladd's Will*, 60 Wis. 187; s. c.; 4 Gray's Cas. Property, 347.

² Vaughan, 135.

in writing only, whereas, in section 17, a writing is one of various alternatives. A comparison of these alternatives ("accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment"), with the things named in our old books as the badges of a completed transaction of sale (Glanvil, Book x. ch. 14; Bracton, 61 b), shows, not so much a close resemblance, as substantial identity. The old writers speak of payment (wholly or in part), earnest, and *traditio*. What the expression "acceptance and actual receipt" in section 17 means is a matter still in debate; but the conjecture is more than probable that the writer of the section meant to indicate in an emphatic way the old *traditio*. Apart from the writing, then, the alternatives of section 17, being of equal operation with a writing, appear to correspond to the old common law emblems of an executed transaction of sale; for by the common law, though the power of two persons was always recognized to pass and receive title at once by parol, if that were their intention, such an intention was not supposed to exist without some of these badges of a completed sale. As these requisites were the marks of a sale as distinguished from an agreement to sell, it is not unnatural that section 17 should have been formerly supposed to apply to executed transactions only. There is, indeed, considerable reason to think, as an original question, that such was the intention of the drawers of the statute, clearly as the interpretation is now settled to the contrary. Observe that executory contracts of sale are included within the provision as to contracts not to be performed within a year; and that the maxim *noscitur a sociis* would put upon section 17 the interpretation of meaning an executed sale, because that part of the statute is occupied with devises, trusts, judgments, and the like—things that operate as conveyances and carry title.

It is very important to take a general view of the Statute of Frauds, so as to avoid the two narrow interpretation frequently put upon it; to escape, for example, saying, with Lord Campbell, in *Morton v. Tibbett* (15 Q. B. 428, 431), that "acceptance under the statute is merely instead of a memorandum." It might be said with as much truth that a memorandum is merely instead of acceptance; the separate requirements of section 17 are perfectly distinct, and each stands on its own footing. The considerations applicable to one may be inapplicable to another.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BAILMENT—NEGLIGENCE—COLLATERAL SECURITY.—A bank is not a gratuitous bailee of collateral security, but is responsible for the want of reasonable and ordinary care in its custody. Where it appears that no record or account of such securities was kept, and no examination in relationship thereto was made, except once in six months, a lack of ordinary care is shown. *Onderkirk v. Central Nat. Bank*, 23 N. E. Rep. 875 (N. Y.).

COMMON CARRIERS—CONTRACT RESTRAINING BUSINESS.—Owners of rival steamboats agree to share profits, etc., in a certain way, and also that if either wishes to sell with a view to going out of the trade, notice should be given to the owners of the other boat, and the owner so selling should not enter the trade again within one year. *Held*, that this agreement is void, as it is against public policy as restraining trade. *Anderson v. Jett et al.*, 12 N. W. Rep. 670 (Ky.).

COMMON CARRIERS—DISCRIMINATION—TANK CARS—QUO WARRANTO.—The defendant company was accustomed to charge a much lower rate for oil shipped in tank cars owned by the shipper than for oil in barrels shipped in the cars of the company. *Held*, that no discrimination could be made in favor of those shipping in their own cars, as it is the duty of the carrier to provide suitable cars, and therefore the company must either charge the same rate for both methods, or else supply tank cars for all. *State v. Cincinnati Ry. Co.*, 23 N. E. Rep. 928 (Ohio).

CONSTITUTIONAL LAW — FULL FAITH AND CREDIT TO BE GIVEN TO THE RECORDS OF ANOTHER STATE.—A, a resident of Massachusetts, learning that his debtor B, also a resident of Massachusetts, had stopped payment, assigned his claim without consideration to C, a citizen of New York, who served a garnishee process on D, a debtor of B in New York. The plaintiffs, B's assignees in insolvency, brought a bill in equity to restrain A from prosecuting the attachments made in New York. The Massachusetts court granted a decree. *Cunningham v. Butler*, 142 Mass. 47. *Held, per Fuller, C. J.*, the judgment should be affirmed. A court of equity has the power to restrain any one within its jurisdiction from doing acts abroad. The record of the New York court disclosed an inchoate lien in favor of A. If, for any cause, however, he had failed in his action, the lien would have fallen with it. Accordingly, when the Massachusetts court restrained A from prosecuting his suit to judgment, the attachment of itself dissolved, and the Massachusetts court had in no way impeached the New York record. *Cole v. Cunningham*, 10 Sup. Ct. Rep. 269. Miller, Field, and Harlan, JJ., dissenting. The discussion presented in this case suggests a line for the classification of the authorities upon this interesting point in constitutional law. It would seem that the cases which have arisen under the provision in question might be divided into two classes: (1.) Cases in which it is said that the State court has done no act which disregards the record of another State. (2.) Cases in which it is allowable to do such an act, even though it clearly disregards the record.

The above case belongs in the first class. The Massachusetts court simply exercised its acknowledged jurisdiction *in personam*, and in no way denied what the New York record showed,—an inchoate lien. So the pendency of a suit in one State is not a bar to an action between the same parties and upon the same subject-matter brought in another State. *Stanton v. Embrey*, 93 U. S. 548; *Memphis R. Co. v. Grayson*, 7 So. Rep. 122. A foreign judgment does not necessarily enjoy the same priority, privilege, or lien as to goods situated in another State, which would be given it in the State where it was pronounced. Story, *Confl. Laws*, § 609.

(2.) The other class of cases. As to those facts upon which the foreign court based its jurisdiction of the parties or subject-matter of the suit, the court of another State may directly contradict the recitals in the foreign judgment. *Thompson v. Whitman*, 18 Wall. 457; *Pennywit v. Foote*, 27 O. St. 600. There are many dicta that the record of another State may be impeached on the simple ground of fraud; but in most, if not all cases, the decisions may be placed upon the more clearly defined ground of lack of jurisdiction. *People v. Darwell*, 25 Mich. 247.

It would seem that the mere fact that a citizen of one State goes into another to evade the laws of his own State, is not sufficient fraud to justify the disregard of a judgment obtained in the court of the foreign State. *Lawrence v. Batchelder*, 131 Mass. 504; *Green v. Van Buskirk*, 7 Wall. 139.

For the authorities, see Cooley, *Cons. Lim.* *17, n. 1; Story, *Confl. Laws*, §§608-9, and notes.

CONSTITUTIONAL LAW — LIBERTY — POLICE POWER.—A clause of the code of West Virginia which provides that no person without a State license shall "keep in his possession for another spirituous liquors," is unconstitutional and void. It is contrary to the fourteenth amendment to the Constitution of the United States, and cannot be justified as an exercise of the police power. *State v. Gilman*, 10 S. E. Rep. 283 (W. Va.).

CONSTITUTIONAL LAW — REGISTRATION LAWS. — The constitution of Michigan gives the right to vote to every citizen, subject to certain qualifications which are unimportant. *Held*, that an act which required all electors to register, and which provided five days for registration before the day of election, was unconstitutional because it gave no opportunity for registration to sick or absent persons, and because it unnecessarily impeded the right of voting by requiring persons whose business might perhaps call them abroad to return on one day to register and on another day to vote. *Attorney-General v. City of Detroit*, 44 N. W. Rep. 388 (Mich.).

CONSTITUTIONAL LAW — SECTARIAN SCHOOLS. — Reading from the Bible without comment is sectarian instruction within the meaning of a clause in the Constitution prohibiting sectarian instruction in the common schools. Such reading from the Bible by teachers in the public schools is also repugnant to a clause in the Constitution providing that "no man shall be compelled to . . . erect or support any place of worship." *State v. District Board of School Dist. No. 8*, 44 N. W. Rep. 967 (Wis.).

CONVERSION — TENANTS IN COMMON — GRAIN ELEVATORS. — It is provided by statute that grain depositors are tenants in common. *Held*, that where the warehouseman sells grain to a greater amount than his share of the deposits, the purchaser is guilty of conversion, and acquires no title. The court recognize the fact that this is an inconvenient rule, since it is the common custom for warehousemen to sell without regard to their outstanding receipts. *Hall v. Pillsbury et al.*, 44 N. W. Rep. 673 (Minn.).

EVIDENCE — DYING DECLARATIONS. — In a trial for murder, statements by the deceased to a physician some hours after being shot, were offered in evidence as dying declarations. It appeared that he had not been informed that he was going to die, nor had he expressed any opinion to that effect, but he had expressed regrets at being taken away from the support of his family. He died shortly afterward. *Held*, reversing conviction below, that his statements as to the manner of his injury were not admissible. *Starks v. State*, 6 So. Rep. 843 (Miss.).

EVIDENCE — PRIVILEGED COMMUNICATIONS. — In an action for negligence the physician who dressed the plaintiff's wounds testified that, in answer to his question as to the cause of the accident, the plaintiff told him that it was his own fault, etc. *Held*, the evidence should not have been admitted, for it is conclusively presumed that the physician will only ask such questions as are necessary to enable him to discover the nature of his patient's injury. *Pennsylvania Co. v. Marion*, 23 N. E. Rep. 973 (Ind.).

INNKEEPERS — LOSS OR BAGGAGE. — On stepping from the train, a porter bearing the name of the defendant's hotel on his cap directed the plaintiff to an omnibus which was to take him to the hotel. The plaintiff, knowing nothing of the actual authority of the porter or by whom the omnibuses were run, gave the porter the check for his valise. The porter said it would come right along in another wagon; but it was lost. *Held*, the defendant was liable, and whether the porter was authorized only to solicit patronage and not to receive baggage, or whether the omnibuses were run by independent contractors under an arrangement with the defendant or by the defendant himself, was immaterial. *Costley v. Nagle*, 10 S. E. Rep. 491 (Ga.).

INSURANCE — PAYMENT OF PREMIUM TO AGENT. — An insurance agent had authority to issue policies, and to collect and remit premiums. He had in his possession money belonging to the defendant, a holder of a policy. By agreement with the defendant, that money, to the extent of the premium, was to be applied in payment of the premium. *Held*, there was a sufficient payment of the premium to bind the company. *Phoenix Ins. Co. v. Meier*, 44 N. W. Rep. 97 (Neb.).

LEGAL TENDER — STREET-RAILWAY COMPANIES. — So long as a silver coin is worn by natural abrasion only, and is not appreciably diminished in weight, it is legal tender; and if a passenger is ejected from a street car for refusal to make payment of fare other than by such coin, he may have action for damages. *Morgan v. Jersey City & B. R. Co.*, 18 Atl. Rep. 904 (N. J.).

LIBEL — PUBLICATION. — A letter contained libellous matter about the person to whom it was sent. He was so illiterate as to be obliged to have another party read it for him. *Held*, a publication. *Allen v. Wortham*, 13 S. W. Rep. 73 (Ky.).

NAVIGABLE STREAM — RIGHT OF ACTION FOR OBSTRUCTION. — The plaintiffs were riparian owners on the banks of a navigable stream. They alleged that the defendant had obstructed this stream so that the plaintiffs were unable to transport certain wood which was piled upon their land, and which they owned, whereby the wood became rotted and greatly depreciated in value. There were also allegations of other special damage. It was held that the plaintiffs could not maintain this action. For the right of navigation is a public right, and an obstruction of navigation is, in the absence of special circumstances, a public nuisance, but not a private wrong. To maintain a private action, damage differing in kind from that suffered by the rest of the public having occasion to use the stream must be shown, and not merely damage greater in degree. "To constitute special damage there must be an invasion or violation of some private right of the individual, as distinguished from the public right which he has of using a public highway in common with the rest of the public." *Swanson et al. v. Mississippi R. R. Boom Co.*, 44 N. W. Rep. 986 (Minn.).

NEGLIGENCE — STATUTORY ACTION FOR DEATH OF HUMAN BEING — MEASURE OF DAMAGES. — In an action by a husband for the negligent killing of his wife, evidence that after marriage there was a marked change for the better in the husband's habits and in his pecuniary affairs is admissible on the question of damages. The statutes giving an action for the death of a human being afford compensation unknown to the common law, and are not to be confined to mere pecuniary damage. *Simmons v. McConnell, adm'r*, 10 S. E. Rep. 838 (Va.).

NEGLIGENCE — SUNDAY LAWS. — Violation of the statute prohibiting unnecessary travel on Sunday will not preclude recovery for an injury received through the defendant's negligence. The plaintiff's illegal conduct is a condition, not a cause, of the injury. *D. L. & W. R. R. Co. v. Trautwein*, 19 Atl. Rep. 178 (N. J.).

NOTARIES PUBLIC — ELIGIBILITY OF WOMEN. — Women are not, in the absence of statute, eligible as notaries public; and the statute authorizing their appointment as attorneys and justices of the peace does not change the rule. *Opinion of the Justices*, 23 N. E. Rep. 850 (Mass.).

PENSIONS — EXEMPTION FROM ATTACHMENT. — A statute of Iowa provides that pensions shall be exempt from attachment, not only when in the "actual possession" of the pensioner, but also when "invested" by him. Under this statute the court held that where pension money was invested in the services of a stallion the colts gotten were exempt from attachment. *Diamond v. Palmer*, 44 N. W. Rep. 819 (Ia.).

QUASI-CONTRACTS — COMPENSATION FOR SERVICES. — The plaintiff, a step-daughter, lived with her step-father from the time she was 9 years old till she married, at 26; she lived as a member of the family, doing housework, receiving her board and clothing, and money from time to time; she now seeks to recover wages for services rendered after she became of age. Held, she must show an express promise by her step-father to pay wages; the facts, as above stated, are not such as to raise a promise implied by law. *Harris v. Smith*, 44 N. W. Rep. 169 (Mich.).

QUASI-CONTRACTS — INSANITY — NECESSARIES. — An obligation will be implied against the estate of a lunatic to repay sums expended to provide her with necessaries. *In re Rhodes*, 38 W. R. 385 (Eng.). See to the same effect *In re Kins*, 44 N. W. Rep. 598 (Mich.).

REAL PROPERTY — DEEDS — DELIVERY. — A married woman, for the purpose of putting her land out of the reach of her husband, executed a conveyance thereof to her children, reserving a life estate to herself. She signed and acknowledged the deed, and caused it to be recorded; but took possession of it, intending to keep it until her death. The children, who were with one exception infants, knew of and assented to the conveyance. Held, these facts constituted *prima facie* a delivery and acceptance of the deed. *Coler v. Coler et al.*, 23 N. E. Rep. 687 (Ind.).

REAL PROPERTY — EASEMENTS — INCHOATE RIGHT. — A statute provided that on purchase of certain lands all rights or easements relating to it should be extinguished on compensation for loss thus inflicted. The plaintiffs' house was built in 1867. The purchase referred to by the statute was made in 1877. Held, that the inchoate right to light was extinguished, and compensation due the plaintiffs therefor. *Barlow v. Ross*, 24 Q. B. Div. 381 (Eng.).

REAL PROPERTY — EMINENT DOMAIN — COMPENSATION. — A school district purchased a "squatter" title to certain land and built a school-house thereon. The real title was in one S., against whom proceedings were now instituted to get the land by the right of eminent domain. *Held*, that although the legal title to the school-house had vested in S., the "just compensation" to be allowed him would not include compensation for the building. *Searl v. School District No. 2*, 10 Sup. Ct. Rep. 374.

REAL PROPERTY — INJURY TO REVERSION — MEASURE OF DAMAGES. — In a suit for damages for injury to the land, only nominal damages can be recovered in the first action for the injury to the reversion; if the obstruction be continued thereafter, vindictive damages can be recovered in a second suit to compel the removal of the same. *Mason v. Norfolk Ry. Co.*, 26 Can. L. J. 185.

REAL PROPERTY — MORTGAGE — SALE UNDER POWER. — A mortgagee had purchased at his own sale, under a power which did not authorize him to become the purchaser. *Held*, that the infant heirs of the mortgagor, who was dead at the time of the sale, could disaffirm it any time within two years after attaining their majority, provided twenty years had not elapsed. *Alexander v. Hill*, 7 So. Rep. 238 (Ala.).

REAL PROPERTY — PERPETUITIES. — A. devised real estate to trustees in fee for B. for life; remainder for life to B.'s children, successively; remainder in fee as the longest liver of B. and his children should by will appoint. *Held*, (overruling *Avern v. Lloyd*, L. R. 5 Eq. 383), that although the survivor would have an absolute interest, still as he was not necessarily ascertainable within lives in being and twenty-one years, the power was void. *In re Hargreaves*, 43 Ch. Div. 401 (Eng.). For a full discussion of *Avern v. Lloyd* see Gray, *Perp.*, chap. vii.

REAL PROPERTY — PRE-EMPTION. — A. settled on land to secure it under the United States pre-emption laws. She died a year later. Her administrator had the patent made out to the heirs, and later got an order from the Probate Court to sell it to pay A.'s debts. *Held*, that the land never was the property of A. and could not be sold for her debts. *Coulson v. Wing*, 22 Pac. Rep. 570 (Kan.).

REAL PROPERTY — RIGHTS OF INNOCENT DISSEISORS. — A mortgagee in possession under a void foreclosure erected a dwelling-house on the land supposing himself to be the absolute owner. Finding out his mistake, he removed the house, doing no damage to the land. *Held*, that on these facts the mortgagee had the right of removal. *Cook v. Cooper*, 22 Pac. Rep. 945 (Oreg.).

REAL PROPERTY — RIGHTS OF TRAITOR IN CONFISCATED PROPERTY. — Property was confiscated and sold for the treason of the owner, under the United States statutes authorizing such confiscation for the term of the owner's life. The owner was subsequently pardoned, and then conveyed all his right, title, and interest in the property. Defendant claims under this conveyance. Action by the heirs of the original owner. *Held*, that the removal of his disabilities by pardon invested in plaintiff's ancestor the power of disposition over the reversion of the property, expectant upon the termination of the confiscated estate, that power having been in suspension during his disability. *Semble*, the reversion in fee remained in the original owner after the confiscation proceedings, though he had no power of disposing of it while he was under disabilities. *Illinois C. R. Co., et al. v. Bosworth et al.*, 10 Sup. Ct. Rep. 231,

SALE — CUSTOM OF TRADE. — Held, a custom of trade among the corn merchants of Augusta would bind only those who had recognized it in their own transactions. *Semble*, it is not enough to show that both the contracting parties were aware of the custom. *Miller v. Moore*, 10 S. E. Rep. 360 (Ga.).

TORT — CONTRIBUTORY NEGLIGENCE. — It is not contributory negligence in a person to risk his life or place himself in a position of great danger in an attempt to save another from death or great bodily harm, provided such acts do not constitute rashness. *Peyton v. Texas & P. Ry. Co.*, 6 So. Rep. 690 (La.). Following *Eckert v. Railroad Co.*, 43 N. Y. 503.

REVIEWS.

ELEMENTS OF LAW. By Sir William Markby, K.C.I.E., D.C.L. Fourth edition. Oxford, 1889. 8vo. Pages xii. and 443.

The merits of this excellent book have been so generally recognized that the reviewer can hardly do more than point out an occasional slip or misapprehension. The learned author's discussion of fraud, duress, and error is in general a model of clearness and accuracy. But his criticism on pages 247 and 359 of *Cundy v. Lindsay*, 3 App. Cas. 459, seems unfounded. The shipment of goods to B. in pursuance of an order in the name of B., but really emanating from A. without B.'s knowledge, surely cannot pass the title to either A. or B. Dr. Markby apparently fails to discriminate between such a case and a sale to A., who, being personally present, pretends to be B. In the latter case the title passes to A., for the vendor did mean to sell to the individual before him although under a misapprehension as to his name.¹ Our author must also have overlooked *Ex parte Adamson*, 8 Ch. Div. 819, and *Houldsworth v. Glasgow Bank*, 5 App. Cas. 331, 338, when he expressed his regret, p. 142, that the convenient word "restitution" had not found a place in accepted English terminology. A printer's error on page 400 puts the Statute of Uses in the reign of Henry VII.

Apart from the acknowledged excellence of this book the appearance of a fourth edition is highly gratifying to all who have at heart the interests of legal education. The marked success of the "Elements of Law," like the similar success of Professor Holland's "Elements of Jurisprudence," shows that the value of the scientific study of law is rapidly gaining recognition even in England. We wish we could add that there was an equal advance there of the belief that the science of law, like any other science, may be best pursued at a university under the guidance of men who make the teaching of law their profession. But university publications like the book before us must hasten the day when English lawyers will recognize, as continental and American lawyers already recognize, the superiority of the law department of a university over all other places of legal education.

J. B. A.

VOID EXECUTION, JUDICIAL AND PROBATE SALES. By A. C. Freeman. Third edition. Central Law Journal Company, St. Louis, 1890. 8vo. Pages 178.

An extended notice of the plan and scope of this work is unnecessary, for, as the publication of a third edition shows, the book is already well known. It may be divided into three parts: the first explains what will render a sale void; the second, the rights of purchasers at void sales; and the third is devoted to an interesting and careful discussion of the constitutionality of the many curative statutes and of those authorizing involuntary sales in the absence of any judicial proceeding whatever. The book covers the subject fully and merits the success which

¹ See accordingly *Edmunds v. Merchants' Co.*, 135 Mass. 283; *Robertson v. Coleman*, 141 Mass. 231.

it has achieved. This edition is well arranged for reference and gives copious citations of authorities. There is a table of cases and an index. The letter-press and paper are excellent.

G. C.

A TREATISE ON PRIVATE CORPORATIONS. By Wm. Wharton Smith, of the Philadelphia bar. Rees, Welsh, & Co., Philadelphia, 1889. 69 pages.

This slender volume is the work of a Harvard graduate of the class of '85, and, we are pleased to state, was the first-prize essay in the graduating class of the University of Pennsylvania Law School in 1888.

The sub-title of the essay indicates the scope of its contents, namely, a discussion of "The effect of the clause of the Constitution of the United States that forbids a State to pass a 'Law impairing the obligation of Contracts,' upon the police control of a State over Private Corporations."

The general doctrine set forth is that involved in the line of decisions that began with the case of *Coates v. Mayor, &c. of New York*,¹ and culminated in the case of *Butchers' Union Co. v. Crescent City Co.*,² and is summed up as follows by the author in the last paragraph of his essay: "Every contract, therefore, between a State and a corporation, created by the grant of its charter to the latter by the former, is made upon the implied condition that the State reserves to itself the power to legislate for the public health and morals; and for the purpose of guarding the public health or protecting the public morals, the State can enact any laws in regard to the corporation, which would be constitutional if applied to an individual, in spite of the fact that the charter of the corporation is a contract, and that the Constitution of the United States forbids any State to pass a law impairing the obligations of contracts."

The essay is a clear and forcible discussion of the history and growth of the above-mentioned doctrine, with a complete citation of the authorities and detailed statements and criticisms of the leading cases. It is of a decided and permanent value to the student of constitutional law.

E. T. S.

¹ 7 Cowen, 585.

² 111 U. S. 746.

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A BRIEF SURVEY OF EQUITY JURISDICTION.¹

VI.

CREDITORS' BILLS.

IT was stated in a former article² that there are three important classes of bills in equity which are founded upon contracts or obligations, and yet are not called bills for specific performance; namely, bills for an account, bills of equitable assumpsit, and creditors' bills. The first and second of these have already been treated of, and it is now proposed to treat of the third.

A creditor's bill is a bill filed by a creditor of a deceased debtor against the personal or the real representative, or against the personal *and* the real representatives, of the latter, to compel payment of the debt.³ The jurisdiction of equity over such bills depends entirely upon the single fact of the debtor's death; for against a living debtor, as such, equity never has jurisdiction, while against the representatives of a deceased debtor equity always has jurisdiction (*i.e.*, in England). What is there then in

¹ Continued from Vol. 3, p. 262.

² Vol. 2, p. 242.

³ It is scarcely necessary to remind the intelligent reader that, in some (perhaps many) of our States, the term "creditor's bill" is commonly applied to a very different kind of bill from that which is the subject of the present article; namely, a bill filed by a judgment creditor, whose execution, issued upon the judgment, has been returned unsatisfied, in whole or in part, to obtain satisfaction of the judgment out of assets of the judgment debtor which cannot be taken upon execution. It will be found convenient to distinguish these two classes of bills from each other, by calling the latter "judgment creditors' bills."

the mere fact of a debtor's death to give to his creditors a right to call upon equity to assist them in enforcing payment of their debts? In order to answer this question satisfactorily it will be necessary to ascertain what obstacles a creditor is liable to encounter, as a consequence of his debtor's death, in attempting to enforce payment of his debt by an action at law.

During the life of a debtor, the only remedy of which his creditor as such can avail himself is against the person of the debtor. It is true that, at the present day, a debtor's property generally constitutes the only means by which his creditor can enforce payment of his debt; but it is only by means of process against a debtor's person that his property can be reached. In short, the creditor must obtain a judgment for his debt against the debtor personally before he can compel payment of the debt out of his debtor's property. When, therefore, the debtor dies, the creditor's remedy is gone. The debtor's property, to be sure, remains, but the creditor cannot touch it unless the law furnishes him with some new remedy. Indeed, when a debtor dies, his debts would all die with him did not positive law interpose to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is impossible that an obligation should continue to exist after the obligor has ceased to exist. Whenever, therefore, a debtor dies, positive law has to interpose, first, to keep his debts alive; and, secondly, to provide his creditors with a new remedy against his property. What is the nature of the remedy which positive law thus provides? If the question were a modern one, or if it were governed by modern ideas, we might expect a remedy to be provided which would be analogous to that which is provided against a bankrupt debtor or against an insolvent corporation. In other words, we might suppose that, in case the debts owing by a deceased debtor were not promptly paid, some court would be authorized, on the application of his creditors, to take his property into its own hands, and apply it to the payment of his debts, giving the surplus, if any, to the persons entitled to receive it. The question, however, is not a modern one, nor is it governed by modern ideas. On the contrary, it is as old as the law itself, and the law relating to it is so bound up with the habits and customs of the people as not easily to admit of change. Accordingly, we shall find that the remedy provided by law for the creditors of deceased debtors is for the most part very

ancient; that, while it has been subject to changes, the changes in it have been very slow and gradual; and that it is almost a total stranger to modern ideas, with the exception of such as have been infused into it by equity.

By the Roman law, every human being who had rights (other than such as were merely personal), or was subject to obligations or duties (other than such as were merely personal), had two personalities (*personas*), one natural, the other legal, artificial, and fictitious; and it was in the latter that his rights were vested, and upon the latter that his obligations and duties were imposed. It was a peculiarity of the legal personality that, being the creature of law, it continued to exist so long as there was any reason for its existence. It was not affected, therefore, by the death of the natural person, but continued its existence in the natural person's successor or heir (*hæres*).¹ It followed, therefore, that every natural person who had rights, or was subject to obligations or duties, at the time of his death, necessarily had a successor or heir, who possessed all his rights and was subject to all his obligations and duties. Moreover, every person's successor or heir was either such person as he himself appointed by his will (*hæres factus*), or, if he made no appointment, such person as was designated by law (*hæres natus*). An heir designated by law became such for his own benefit alone. An heir appointed by will was required to pay such legacies as were given by the will, subject to which he also took the inheritance for his own benefit. In respect to the obligations and duties to which the deceased was subject at the time of his death, there was no difference between the *hæres factus* and the *hæres natus*; for such obligations and duties fell, necessarily and by operation of law, upon the one and the other, without distinction. So completely, indeed, was the heir of the deceased person identified with the deceased, that the law made no distinction between the estate of the one and that of the other, nor between the debts of the one and those of the other. If, therefore, an insolvent heir succeeded to a solvent inheritance, the creditors of the heir had as much right to be paid their debts out of that inheritance as the creditors of the deceased had; and if a solvent heir succeeded to an insolvent inheritance, the creditors of the deceased had as much right to be paid out of the heir's own estate as his own creditors had; and the only way of avoiding this last consequence of becoming a

¹ See Maine, *Ancient Law* (4th ed.), 181-8.

deceased person's successor was by refusing to accept the succession.¹ It will be seen, therefore, that the remedy of a creditor of a deceased debtor was very simple under the Roman law, *i.e.*, he sued the heir of the deceased, just as he would have sued the deceased during his life, and with the same consequences; and this state of things continued without material change throughout the whole period of the Roman law, *i.e.*, down to the time of Justinian. Justinian introduced one important change, and only one, namely, that of allowing the heir the benefit of inventory (*beneficium inventarii*); for he declared that such heirs as chose to prepare and file, within the time and in the manner directed by him, an inventory of the estate of the deceased should be liable to the creditors of the latter only to the extent of such estate.² From this time, therefore, an heir was liable under the old law or the new, according as he did or did not comply with the new law. If he did, he incurred a liability only to account for the estate of the deceased; if he did not, he remained personally liable for all the debts of the deceased as before. If an heir availed himself of the new law, of course he became bound to keep the estate of the deceased separate from his own estate.

After the Roman empire became Christian, the Church by slow degrees obtained control of the administration of the estates of all deceased persons. This result it finally accomplished by obtaining for its bishops the right to administer the estates of all deceased persons within their respective dioceses. In this way it came to be the law, throughout Western Christendom at least, that the heir of every deceased person was the Ordinary, *i.e.*, the bishop of the diocese. This, however, did not mean that the estates of deceased persons were administered by the bishop personally,—it only meant that they were administered by persons appointed by him, who derived their authority from him, and who were accountable to him. Nor did this right of the bishop practically interfere with the immemorial right of every person to appoint his own heir by will. On the contrary, this latter right continued to be exercised as before, the only difference being that an heir appointed by will must now obtain the bishop's sanction before he could act,—a sanction, however, which was seldom withheld.³ It thus came

¹ Justinian, Inst., L. 2, Tit. 19, § 5; Gaius, L. 2, §§ 162, *et seqq.*

² Inst., L. 2, Tit. 19, § 6; Code, L. 6, Tit. 30, § 22.

³ By the law of England the bishop was bound to give his sanction, and, if he refused to do so, a *mandamus* would issue. 1 Williams, Executors (1st ed.), 214.

about that the estate of every deceased person had to be administered by a person appointed by the bishop of the diocese. If the person so appointed was nominated in the will of the deceased, he came to be known as the executor of the will (*executor testamenti*) ; if the appointment was made without any such nomination, he was known as the administrator of the estate of the deceased. Practically, therefore, the modern executor is the *haeres factus*, as the modern administrator is the *haeres natus*, of the Roman law. In strictness, however, as already stated, the original right of administration is in the bishop ; and this appears clearly from the fact that his appointments of executors and administrators always take effect as grants.¹

The transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities indirectly brought about two material changes : first, heirship ceased to be a private right, and became an office, in the performance of which the heir as such had no personal interest ; secondly, when heirship had ceased to confer any pecuniary benefit upon the heir, the absurdity of holding the latter personally liable for the debts of the deceased became manifest ; and hence the doctrine that an heir was so liable became entirely obsolete, while the exhibiting of an inventory ceased to be a privilege, and became a duty.

Two further remarks are called for respecting the transfer of the jurisdiction over the estates of deceased persons from the secular to the ecclesiastical authorities, namely, first, that in England it extended only to personal or movable property, feudalism having secured complete dominion over land ; secondly, that it did not extend to the payment of debts, as to which executors and administrators have always been amenable to the secular authorities.

We are now prepared to inquire what remedy was furnished by the law of England to a creditor of a deceased debtor against the personal property of the latter, at the time when equity first assumed jurisdiction over creditors' bills. First, the remedy was an action by the creditor against the executor² of the deceased, as by the Roman law it was an action against the heir. Secondly, the executor was bound to pay the debts of the deceased out of his personal property, *i.e.*, so far as such property would enable him

¹ See *Idem*, pp. 212-13, 268-9. See also a learned and instructive article by Mr. Henry C. Coote, *1 Law Mag. and Law Rev.* 252-267.

² As there will be no occasion hereafter to distinguish between executors and administrators, the term "executor" will alone be used.

to do so, but no further. He was not, therefore, regarded as personally owing the debt, and, though an action of debt lay against him, he was liable only in the *detinet*, — not in the *debit et detinet*. Thirdly, the executor still retained so much of the character of his prototype, the Roman heir, that the law always assumed that the assets in his hands were sufficient for the payment of debts, until the contrary appeared; and hence the creditor never had the burden of alleging and proving that the executor had sufficient assets to pay his debt.¹ Fourthly, if the executor had not sufficient assets to pay the plaintiff's debt, he had to set up that fact as an affirmative defence and prove it. If he failed to set it up, or failed to prove it, and the plaintiff recovered in consequence, the verdict and judgment, or (if the judgment was by default or on demurrer) the judgment alone, established conclusively that the executor had sufficient assets, it being a universal principle that a defendant who fails to set up or to prove an affirmative defence at the proper time, loses the benefit of it, the law acting on the supposition that he has no such defence, and not permitting him to say to the contrary.² Therefore, fifthly, the question whether the executor had assets to pay the plaintiff's debt was always settled conclusively at the trial. If it appeared that he had not, there was a verdict and judgment in his favor, and the plaintiff paid costs. If it did not so appear, there was (in the absence of any other objection to the plaintiff's recovering) a verdict and judgment for the plaintiff, in which event the executor had to pay the judgment, even though he paid it out of his own pocket. Still, sixthly, the judgment, in accordance with the legal theory of the executor's liability, was only that the plaintiff recover the amount out of the assets of the testator in the executor's hands, or, in technical language, the judgment was *de bonis testatoris*, — not *de bonis propriis*. In short, while the judgment established the liability of the executor conclusively, it did so, not by making the debt of the testator his debt, but by proving conclusively that he had assets of the testator sufficient to pay it. Seventhly, when an execution was issued on a judgment against an executor, a failure by the latter to show to the sheriff goods of the testator out of which the amount of the judgment could be made, proved that the executor had wasted or con-

¹ William Banes's Case, 9 Rep. 93 *b*.

² Rock v. Leighton, 1 Salk. 310, Comyns, 87, 1 Ld. Raym. 589, 3 T. R. 690; Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 T. R. 685; Leonard v. Simpson, 2 Bing. N. C. 176; Palmer v. Waller, 1 M. & W. 689.

verted to his own use a sufficient amount of the testator's assets to pay the judgment; *i.e.*, that the executor had committed that species of tort known as a *devastavit*. Eighthly, when an executor had committed a *devastavit* he was required to pay the testator's debts, to the extent of such *devastavit*, out of his own pocket. This liability could be enforced by a creditor who had already recovered a judgment *de bonis testatoris*, in either of two ways; namely, by bringing a new action against the executor personally for the tort, in which action, of course, the judgment was *de bonis propriis*, or by issuing a *scire facias* on the judgment already recovered, calling upon the executor to show cause why the plaintiff should not have execution against the executor's own goods.¹

The next question is, whether any sufficient reason can be found, in the matters stated in the preceding paragraph, for permitting a creditor of a deceased debtor to file a bill in equity against the executor of the latter, instead of suing him in an action at law. Before considering that question, however, it may be well to point out briefly the nature of the relief which equity gives upon a creditor's bill, in order that the reader may compare such relief with the remedy given by the common law, as stated in the preceding paragraph. Equity takes its stand in effect upon the Constitution of Justinian, by giving the executor his choice between accounting for the testator's personal estate, on the one hand, and paying the testator's debts out of his own pocket, on the other hand. Justinian's Constitution said to the Roman heir that he might avoid personal liability for the debts of the deceased by accounting for the estate of the latter, *i.e.*, by preparing and filing an inventory, which, of course, must be followed up, if necessary, by a full accounting. Equity says to the modern executor against whom a creditor's bill is filed, that he may, so far as the plaintiff is concerned, avoid the burden of accounting for the testator's estate by admitting in court sufficient assets to pay the plaintiff's debt, and thus making himself personally liable for such debt. And equity requires the executor to make his choice at the earliest practicable moment, namely, in his answer to the bill. If the executor admits assets in his answer, all that the plaintiff has to do at the hearing is to prove his debt, whereupon a decree will be made that the executor pay the debt thus proved, and this decree will be enforced by the usual process of

¹ See *Wheatley v. Lane*, 1 Wms. Saund. 2162, with Serjeant Williams's notes.

contempt. If the executor decline to admit assets in his answer, the only difference at the hearing will be that instead of a decree for immediate payment, a decree will be made that the executor render an account of the testator's estate before a Master. When this has been done, and the Master has made his report to the court, and the report stands confirmed, the cause is brought on for a further hearing, and a decree is made that the executor pay to the plaintiff the amount which has been found due to him, if the assets found to be in the executor's hands are sufficient for that purpose,—if not, then to the extent of such assets.

It would be difficult to devise a course of proceeding more perfectly adapted to the exigencies of the case, more simple, more direct, or more conformable to justice, than the foregoing; and there can be no doubt that, in all these particulars, it possesses a great advantage over the corresponding course of proceeding at common law. Still, the mere fact that the remedy furnished by the common law was not as good as it might be, while it might be a sufficient reason for demanding a better one, either from the courts themselves or from the Legislature, was scarcely sufficient to justify equity in assuming jurisdiction over a purely legal right. We must, therefore, go further, and inquire whether the case is one for which the common law cannot furnish an adequate remedy; and, in doing this, we may as well go at once to the point of chief difficulty, namely, the defence of want of assets. How shall a court of common law deal with this defence? How shall it find out whether an executor has sufficient assets or not? Clearly there is but one way of doing this properly, namely, by requiring an account from the executor of the estate of his testator. Can a court of law require such an account? A court of law can, indeed, take an account after a fashion, for it formerly did do it in the action of account; but then there was special machinery provided in that action for taking an account, and the account was not taken before a jury. The action of account, however, would not lie for the recovery of a debt, nor any other action except debt or *indebitatus assumpsit*. Only debt and *indebitatus assumpsit* would lie, therefore, against an executor for the recovery of a debt due from his testator. But in neither of these actions was there any machinery for taking an account. In each of them there was but one trial, namely, by a jury. The judgment, moreover, was the next step in the action

after the trial; *i.e.*, the trial ended in a verdict, and upon the verdict judgment was rendered. If any account was to be taken, therefore, in either of these actions, it must be taken at the trial; and yet it was never claimed that an account could be taken by or before a jury.

But the difficulty was not confined to the tribunal by or before which the account must be taken. It was more fundamental. An account is rendered in discharge of an obligation to account. It is rendered, not for the benefit of the party rendering it, but for the benefit of the party to whom it is rendered, the latter having acquired a right to have it rendered. It may, of course, be rendered voluntarily, just as any obligation may be voluntarily performed; or it may be rendered by compulsion, *i.e.*, by the compulsion of an action or suit. When rendered by compulsion, it is rendered pursuant to the judgment or decree of a court. This judgment or decree may be the result of a trial, or it may be pronounced upon the defendant's admissions, according as the defendant denies or admits his obligation to account; but in either case the accounting is the primary object for which the suit is brought (the ultimate object being the payment of whatever the plaintiff shall be entitled to receive as the result of the accounting), and in either case, therefore, the accounting is by way of relief.

When, however, an executor sets up a want of assets in an action of debt or *indebitatus assumpsit* brought against him by a creditor of his testator, he does so, as we have seen, by way of affirmative defence, and the setting up of an affirmative defence is a very different thing from rendering an account. An affirmative defence is always set up voluntarily, and for the defendant's own benefit. Instead of coming after a judgment or decree, it comes before the trial, and the setting of it up is a step leading up to the trial. Instead of being an object of the plaintiff's action, it is one of the means by which the defendant resists the action,—instead of being the relief for which the action was brought, it is a means of preventing the plaintiff from obtaining any relief. Moreover, an affirmative defence always consists of facts, of which truth or untruth may be predicated; and when such a defence is set up in an action at law, as the truth of the plaintiff's declaration stands admitted, the trial turns entirely upon the truth or untruth, the validity or invalidity, of the defence. If the defence turn out to be

true and valid, the action will be wholly defeated; if it turn out to be untrue or invalid, it will go for nothing, and the plaintiff, unless his declaration be bad in law, will recover his entire demand. An affirmative defence, therefore, can never succeed in part and fail in part; unless it is wholly successful, it must wholly fail, and hence, if such a defence consist of several facts, every one of those facts must be true, or the entire defence will fail. It follows, therefore, that an affirmative defence must be so framed that the plaintiff can traverse it, and must consist of such matter that, if the plaintiff does traverse it, or any fact of which it consists, an issue may be joined, upon the decision of which the entire action will depend.

The question now under consideration, namely, whether an executor has in his hands sufficient assets to pay a creditor of his testator, will serve to illustrate some of the differences between an accounting and a defence. The object of an accounting by an executor, at the suit of a creditor of his testator, is to ascertain *how much* assets the executor has in his hands; and it is always the creditor who wishes to accomplish this object, and in order to accomplish it he must bring the proper action, or must properly frame his action. Moreover, as an action of account would not lie in such a case, there never was an action at law by which this object could be accomplished. On the other hand, the object of a defence of want of assets, to an action against an executor by a creditor of his testator, is to defeat the action, and, of course, it is always the executor who wishes to accomplish that object. But the only way of making want of assets a defence to such an action, and thus defeating the action, is by showing that the executor has no assets, or that he has none which are applicable to the payment of the plaintiff's debt, or that he has only a stated amount of assets, being an amount insufficient to pay the plaintiff's debt. If, then, the executor plead that he has no assets, and the creditor traverse the plea, and issue be joined upon the traverse, the question at the trial will be, not how much assets the executor has, nor whether he has enough to pay the plaintiff's debt, but whether he has any. If this question be decided in the negative, the plaintiff will fail in his action.¹ If it be decided in the affirmative, the plaintiff will have a verdict and judgment for his whole demand.² And it may be remarked that this result has at least one merit; namely, that it makes it very perilous

¹ 1 Rol. Abr. 929 (B), pl. 2.

² 1 Rol. Abr. 929 (B), pl. 1.

for an executor, who must be supposed to know the facts, to plead falsely. Unless, therefore, it is very clear that he can show a total want of assets, it will stand him in hand to consider whether he will not adopt the third mode of pleading, in which case the plaintiff may admit the plea to be true, and take judgment for his debt, to be levied immediately to the extent of the assets admitted, the remainder to be levied of assets which shall afterwards come to the executor's hands (*quando acciderint*¹), or the plaintiff may traverse the plea; and in that case the whole action will turn upon the question whether the executor has any more assets than he has admitted. Formerly, however, it often happened, in England, that an executor, who was sued by a creditor of his testator, had assets in his hands, but they were all applicable to the payment of debts of a higher degree than the plaintiff's, and which were, therefore, entitled to be paid before the plaintiff's; and in that case the executor adopted the second mode of pleading; and he was then required to specify in detail all the debts of a higher nature than the plaintiff's, for the payment of which he claimed that the assets in his hands were bound. When the executor's plea took this shape, the creditor could either traverse the allegation that the executor had no assets beyond the amount of preferred debts set out in the plea, or he could traverse the existence of the preferred debts, or of a sufficient portion of them to bring the remainder within the limits of the assets admitted by the executor. In short, the creditor could either deny that the assets amounted to so little, or that the preferred debts amounted to so much, as the executor claimed.²

Such, it is conceived, is the true theory of the common-law defence of want of assets, pleaded by an executor to an action brought against him by a creditor of the testator; and there is believed to be no room for doubt that, in early times, theory and practice were in this respect in entire harmony with each other.³ There was, however, long since a departure from principle in one particular which introduced a great change in practice. Thus, as early as the time of James I., in a case reported by Lord Coke,⁴ where the debt sought to be recovered was £200, and issue

¹ See *Noell v. Nelson*, 2 Wms. Saund. 214.

² See *Hancocke v. Prowd*, 1 Wms. Saund. 328, with Serjeant Williams's notes.

³ See *infra*, pp. 120-1.

⁴ *Mary Shipley's Case*, 8 Rep. 134 a.

was joined on the traverse of a plea of *plene administravit*,¹ and the jury found that the executor had assets to the amount of £175 only, the court, while holding that the plaintiff was entitled to judgment for £200, besides damages and costs, intimated that the plaintiff would be entitled to levy only £175; and, in the time of Charles I., in a case similarly circumstanced, the court said: "When it is found that the defendant hath some assets, although of little value, so as he hath not fully administered, the plaintiff shall have judgment for the entire debt, but he shall not have execution but of as much as is found, and shall not be barred for the residue; and if more assets come afterwards, he may have a *scire facias* to have execution thereof."² This is certainly an extraordinary doctrine, as it involves a plain contradiction. The court, having given judgment that the plaintiff recover his entire debt, to be levied of the goods and chattels of the testator in the executor's hands (*i.e.*, the whole of it to be so levied, and levied immediately), said, nevertheless, that the plaintiff could, by virtue of that judgment, have execution for a part of his debt only, and that, in order to obtain an execution for the remainder, he must bring a *scire facias* (*i.e.*, a new action in effect), prove new facts, and obtain a second judgment,—which, however, could be (and was) only a repetition of the first. And yet this doctrine continued to be recognized and acted upon until the time of Lord Mansfield.³ That it was, however, a departure

¹ An executor's plea of want of assets is commonly called a plea of *plene administravit*, because it begins with an allegation that the defendant hath fully administered all the goods and chattels which were of his testator at the time of his death, but then the plea immediately adds, that the defendant hath no goods or chattels which were of said testator at the time of his death in his hands to be administered, nor had at the commencement of the action, or at any time since; and this negative allegation is the material part of the plea, and the part on which a traverse must be taken. *Reeves v. Ward*, 2 Bing. N. C. 235. The plea was also formerly known as a plea of *riens entre mains*, and that seems to be a better name for it than *plene administravit*. See *infra*, p. 120, n. (2).

² *Dorchester v. Webb*, Cro. Car. 372-373.

³ Thus, in the great case of the Bank of England *v. Morice*, 2 Str. 1028, Cas. t. Hardw. 219, which was decided during Lord Hardwicke's chief justiceship, and in which the form of the judgment was specially considered and settled by the court, the jury found that the plaintiff's debt amounted to £28,993 8s. 1d., and that the defendant had assets, applicable to the payment of the plaintiff's debt, amounting to £14,659 12s. 9d.; and the judgment was in effect that, inasmuch as the assets amounted only to the sum last named, *therefore* the plaintiff recover his entire debt, with costs amounting to £200 7s. 7d., thus making in all £29,193 15s. 8d., to be levied *de bonis testatoris*! See Cas. t. Hardw. 230-31, where the judgment is given *verbatim*. It is not too much to say that this judgment is upon its face quite unintelligible.

from a more ancient practice, seems to be clear; for if the law had always been, in regard to the execution, as the court declared it to be in *Dorchester v. Webb*, the judgment would have been that the plaintiff recover his debt, to be levied immediately to the amount of the assets found in the executor's hands, and as to the remainder to be levied of assets which should afterwards come to the executor's hands; and, if a change was to be made, the judgment should have been first changed, and then the corresponding change in the execution would have followed as a matter of course. As it was, however, the execution was changed while the judgment was permitted to retain its original form; and it remained for Lord Mansfield to make the execution conform to the judgment by changing the form of the latter in the manner just suggested.¹ Since this latter change was made, therefore, whatever may be said of the judgment and execution, taken together, they have at least had the merit of consistency.

This change in the execution caused an important change in the trial, and in the function of the jury; for, as soon as it was decided that the plaintiff could have immediate execution for the amount only of the assets in the executor's hands, it became necessary for the jury to inquire, and find by their verdict, how much assets was in the executor's hands; and the only way of doing this was for the jury to ascertain, first, how much assets the executor had received, or would have received if he had done his duty; then, how much he had justly and legally paid out, and how much, if any, he had lost without his fault; and the difference between these two aggregates would be the amount in the executor's hands, either actually or in legal contemplation. This, however, is neither more nor less than taking an account,—it is the precise process which has to be gone through with in every account that is taken.

The courts, therefore, in thus changing the nature of the trial, lost sight of the nature of the action, of the defendant's plea, and of the issue joined, and required the jury to do something very

¹ *Harrison v. Beeches*, cited 3 T. R. 688. This was an action of assumpsit, to which the defendant pleaded *plene administravit*. At the trial, before Lord Mansfield, the plaintiff proved a debt of £80, and the defendant was found to have assets amounting to £25. The plaintiff's counsel insisted that he was entitled to a verdict for his whole debt. Lord Mansfield said: "The law was certainly understood to be so, and there are a hundred cases so determined. This struck me as absurd and wrong." Accordingly, the plaintiff had a verdict and judgment for £25, and a judgment of assets *quando acciderint* for the residue of his debt.

different from trying the issue which they had been impanelled to try, and something which they were not competent to do properly.

The matter must, however, be looked at from still another point of view. Independently of any of the changes before referred to, the issue joined upon a traverse of a plea of *plene administravit* always involved an anomaly in respect to the burden of proof. That issue was, as we have seen, whether the executor had any assets in his hands applicable to the payment of the plaintiff's debt, or any more than he had admitted having. Upon this issue the plaintiff held the affirmative; for if the executor had assets which he denied having, that was an affirmative fact; and yet the executor had the burden of proof, for the issue was joined upon a traverse of his affirmative plea (*i.e.*, affirmative in law, though negative in fact), and, therefore, he must prove his plea in order to succeed in the action. But how could the executor prove that he had no assets, or only a stated amount of assets? Of course he could show what assets he had disposed of, and how; but that would signify nothing until it appeared what assets he had received. How could this latter fact be made to appear? Only in one way, namely, by proof on the part of the plaintiff; and hence the anomaly just alluded to, and which consisted in this, namely, that, while the executor had the burden of proof, the plaintiff (the creditor) had to begin at the trial by proving the receipt of assets by the executor, and then the executor proceeded to show what had become of the assets with which the plaintiff's evidence had charged him; and this anomaly existed equally, whether the jury were confined to a trial of the issue, according to what the writer conceives to have been the original and proper practice, or whether they were required to take an account, according to the modern practice.¹ But how could a creditor of the testator prove what amount of assets the executor had received? Clearly, he could not do it (except by accident) without the executor's assistance; and yet a common-law court had no means of compelling an executor to give such assistance to a creditor. The creditor could, of course, file a bill for discovery, but that

¹ In *Dean and Chapter of Exeter v. Trewinnard*, Dyer, 80 a, in the time of Edward VI., to a *scire facias* against an administrator on a judgment recovered against the intestate, the defendant pleaded *plene administravit*, on which there was an issue; and the reporter says: "In giving the evidence to the jury the defendant commenced first. Note this, for I believe it is unusual, because he is in the negative, for the conclusion of *plene administravit* is, and so nothing within his hands (*riens entre mains*)."

would scarcely answer his purpose, as he could only by that means compel the executor to answer categorically specific charges or interrogatories. The ecclesiastical court, indeed, required the executor to make and file in its registry a sworn inventory of the testator's personal estate; and this, if properly done, would serve the creditor's purpose, at least down to the time when the inventory was sworn to; for the inventory would of course be evidence against the executor as an admission by him. There were two reasons, however, why a creditor should not have been satisfied with such assistance from the executor as he would obtain through the ecclesiastical court: first, it was a hardship on the creditor to have to sue the executor both in an ecclesiastical court and in a common-law court, in order to recover a debt about which there was no controversy;¹ secondly, the Court of King's Bench held (strangely enough) that the ecclesiastical courts had jurisdiction only to compel an executor to file *an* inventory,—not to compel him to file a sufficient and proper inventory; and hence, if one of those courts attempted to do the latter, the King's Bench would grant a prohibition, on the application of the executor.² The creditor, therefore, could only obtain such an inventory as the executor chose to swear to and exhibit.

Such were the obstacles which a creditor was liable to encounter who sued the executor of his deceased debtor at law. Did they constitute a sufficient reason for permitting him to sue in equity? This question must be answered in the affirmative. First, justice to the creditor and to the executor alike required that an account should be taken of the assets received by the executor, unless the latter was willing to admit that he had sufficient assets to pay the plaintiff's debt. Even, therefore, if courts of law had never attempted to take an account in such cases, equity would have been abundantly justified in assuming jurisdiction. Secondly, although the courts of common law attempted, in the manner already explained, to convert the trial of a common-law issue into the taking of an account, yet they did not thereby render the in-

¹ In *Mara v. Quin*, 6 T. R. 1, 6, it appeared that, after issue was joined, the plaintiff had to cite the defendant in the ecclesiastical court to exhibit an inventory, and that it took him nearly two years to accomplish that object, during which time, of course, the trial was delayed.

² *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr. 1922; *Henderson v. French*, 5 M. & S. 406; *Griffiths v. Anthony*, 5 Ad. & El. 623. That the ecclesiastical courts did not accept this view, see *Telford v. Morison*, 2 Addams, 319.

terference of equity unnecessary,—they only changed the ground for such interference. As equity always held that courts of common law were not competent to enforce an accounting properly, even in an action expressly framed for that purpose, and in which a special tribunal was provided for taking the account after a jury had decided that an account ought to be taken, it would be a waste of time and space to argue that they were not competent to do it in a case where the form of action, the nature of the pleadings, the question to be tried, and the mode of trial,—all forbade their even attempting to do it. Thirdly, justice to the creditor imperatively required that an executor, who refused to admit sufficient assets to pay him, should render an account of the assets received by him under oath, *i.e.*, that he should make up and bring in an account, containing a full and minute enumeration and description of the items of charge and items of discharge, the former consisting of the assets received by him, the latter of the payments, etc., made by him,¹ and that he should make oath to the truth and completeness of such account,—in particular that it omitted nothing of the personal estate of the testator which had come to the executor's knowledge;² and, this having been done, justice further required that the executor should answer categorically and under oath all such proper charges and interrogatories as the creditor should make and propound. All these advantages the creditor who sued in equity obtained as a matter of course, while the creditor who sued at common law could obtain such of them only as might be afforded by the inventory which the executor could be required to exhibit in the ecclesiastical court, and even that inadequate substitute for the assistance which equity would afford to him, the creditor could obtain only at the expense of two suits.

Such, it is conceived, are the reasons (still existing) which justified equity in assuming jurisdiction over creditors' bills against executors. Another reason, however, formerly existed, which seems to have had considerable (though it is difficult to say how much) influence in establishing the jurisdiction; and, though it was a reason which has now ceased to have much force, even in England, yet it would be wrong to omit all mention of it.

Debts are of three principal degrees or grades; namely, simple contract debts, which are the lowest; debts created by specialty, which are the next higher; and debts created by matter of record,

¹ See Vol. 3, p. 259, n. (1).

² See Vol. 3, p. 241.

including judgments, which are the highest of all. Formerly, moreover, when a debtor died, his debts were required to be paid in the order of their grade; namely, debts by matter of record first, specialty debts next, and simple contract debts last of all. Specialty debts and debts by matter of record had also other important advantages, which will be mentioned hereafter. For these reasons, it was, of course, a matter of importance to a creditor that his debt should be of as high a nature as practicable, and therefore specialty debts and debts by matter of record were incomparably more common than they are now. The form of specialty by which debts were created was almost invariably a bond with a condition, *i.e.*, a bond by which the debtor acknowledged himself bound to the creditor for a sum larger than (generally twice as large as) the real debt, with a condition making the bond void on payment of the amount actually due by a day named. The larger sum was, therefore, in the nature of a penalty incurred by the debtor in the event of his failing to pay the smaller sum according to the terms of the condition; and yet, upon breach of the condition, the larger sum became the actual legal debt.

The matters of record by which debts were created were judgments, recognizances, and statutes. Judgments were rendered either *in invitum* or upon confession. The object of confessing a judgment was to give a creditor the security afforded by a judgment for the payment of his debt; and hence a judgment confessed was, like a bond, generally for a larger sum than was actually due, and so was in the nature of a penalty. A recognizance was (and is) an acknowledgment of a debt in a court of record, the acknowledgment thus becoming a record; and it is usually given in an action or in some other legal proceeding (*e.g.*, bail always become bound in a recognizance); and its object generally is to secure the payment of a smaller sum, or the doing of some other act. Statutes (now obsolete) were formerly very common in England, and were either statutes merchant, statutes staple, or recognizances in the nature of statutes staple.¹ They differed in substance from bonds only in this, that they derived their efficacy, not from being sealed and delivered by the debtor, but from being acknowledged by him before a judge or other officer designated

¹ Statutes merchant had their origin in the statute *De Mercatoribus*, 13 Edward I., statute 3; statutes staple, in the statute of 27 Edward III. c. 9; and recognizances in the nature of statutes staple, in the statute of 23 Henry VIII. c. 6.

by statute, and thereupon becoming, by force of the statute, matters of record.

It will be seen, therefore, that all debts by matter of record, except judgments rendered *in invitum*, as well as all specialty debts, after the conditions on which they originally depended were broken, were generally in the nature of penalties. It will be seen also (indeed it has already been seen) that an executor who was sued at law by a creditor of his testator, and who had an amount of assets in his hands equal to the plaintiff's debt, might yet defend himself by showing that such assets would all be required for the payment of debts of his testator of a higher nature than the plaintiff's debt; and for this purpose debts which were in the nature of penalties only were as good as any other debts, for they were still legal debts. And yet, as equity would always relieve against penalties, all that equity would permit the owners of such debts to recover was the amount actually due; namely, principal, interest, and costs. An executor might, therefore, defeat a creditor at law by means of legal debts of a higher nature which had no existence in equity, *i.e.*, when there were assets enough to pay all debts of a higher nature which were due in equity, and also to pay the plaintiff in full. Creditors, therefore, who were met with such a defence were frequently driven into equity, not only as the sole means of ascertaining the truth in regard to debts of a higher nature due from their debtor, but as the sole means of obtaining payment from a solvent estate; namely, by compelling creditors of a higher nature to extinguish the debts due to them by way of penalties on receiving principal, interest, and costs.¹

¹ According to the ancient mode of pleading, when an executor pleaded debts of a higher degree than the plaintiff's, and alleged that he had not more than sufficient assets to pay the former, it never appeared, upon the face of the defendant's plea, whether such debts of a higher degree were penalties or not. The case of *Page v. Denton*, 1 Ventr. 354, is said to have been the first in which a different mode of pleading was adopted. There, an executor pleaded a bond given by the testator to himself, and stated that the condition of it was to pay rent, and that, at the time of the testator's death, the sum of £300 was due from the testator to the defendant for rent; and the court commanded the defendant's mode of pleading by saying: "If men would plead their case specially, it would save many a suit in Chancery." This remark proves that creditors' bills, the object of which was to ascertain, not the amount of assets, but the amount of preferred debts, were then well known. An instance will also be found in *Pigott v. Nower*, 3 Swanst. 534, note, of a creditor's bill, filed as early as February 1, 1671, the object of which was to ascertain the amount of actual debt for which certain judgments had been confessed by the defendant as administratrix of her husband. In *Parker v. Dee*, 2 Ch. Cas. 200, Cas. t. Finch, 123, 3 Swanst. 529, note, the plaintiff had first brought an action at law, to

It will not have escaped the observation of the attentive reader that all of the reasons which have been given for permitting the creditor of a deceased debtor to sue the executor of the latter in equity, are confined to cases in which, if the creditor sue at law, he will be met with the defence of want of assets. Ought equity, then, to have entertained a bill by a creditor who gave no reason for supposing that he would be met at law by such a defence? In answer to this question, it may be observed that it would have been impracticable for equity to entertain the inquiry whether the defence of want of assets would be set up at law or not, as in numberless cases it would have been a matter of pure conjecture. The only way, then, of limiting the jurisdiction would have been to require every creditor to sue at law first, and to permit a creditor to sue in equity only when he had been met at law with the defence of want of assets. A consequence of such a course, however, would have been that, as an action at law and a suit in equity cannot be prosecuted concurrently for the same claim, a creditor, upon suing in equity, must have discontinued his action at law,¹ and that he could have done only upon payment of costs. To have limited the jurisdiction, therefore, in the manner suggested, would have imposed a heavy burden upon creditors as a condition of their suing in equity, and that, too, without any corresponding advantage to the estates of deceased debtors. It would also have placed in the hands of executors a powerful instrument of delay in precisely those cases in which the temptation to an executor to hinder and delay the creditors of his testator is strongest. Accordingly, it became settled at an early day that the jurisdiction of equity was subject to no condition or limitation whatever.²

It is further to be observed that the reasons which have been given for the jurisdiction relate entirely to the immediate relief sought, namely, either an admission of assets or an accounting,—

which the defendant had pleaded several judgments, which were upon penal bonds, and that he had no assets *ultra*, etc.; whereupon the plaintiff filed a bill (in April, 1668), "to discover the truth of the plea, and debts therein set forth, and the assets." See also *Bank of England v. Morice*, 2 Str. 1028, Cas. t. Hardw. 219.

¹ In *Parker v. Dee*, *supra*, the plaintiff was compelled to elect whether he would sue at law or in equity, and he elected to sue in equity.

² In *Pigott v. Nower*, *supra*, Lord Nottingham said: "If a man foresee that *plene administravit* may be pleaded at law, and then come first into equity, as he may, why should not that avail him as much as if he had falsified such a plea? For a man is not bound to play an aftergame, and stay till he be hurt by a plea. It is no cause of demur to a bill for discovery of assets, that fully administered is not yet pleaded."

not at all to the final relief sought, namely, payment of the debt; and yet it has never been doubted, since the time of Lord Nottingham,¹ that the admission of assets or the accounting should be followed up by a decree for the payment of whatever the plaintiff is found entitled to receive; and this decree is made upon the principle of avoiding a multiplicity of suits. The ultimate relief, therefore, is consequential upon the primary relief, a creditor's bill against an executor being in this respect like a bill for an account.²

Creditors' bills against executors constitute one of the oldest heads of equity jurisdiction. At how early a date this jurisdiction was habitually exercised, it seems impossible to say. It was well established in the time of Lord Nottingham;³ and before his time few doctrines of equity were well settled, or can be accurately traced.

We must now inquire into the rights of a creditor of a deceased debtor to call upon equity to assist him in enforcing payment of his debt out of the land of his debtor. It has already been remarked that feudalism secured complete dominion over the land of deceased persons; and that is the reason that the land of a deceased person descends to his heir, instead of going to his executor. What effect had this upon the rights of creditors? The chief object of feudalism was to secure the performance by tenants to their lords of the services for which the former held their lands from the latter. Hence feudalism did not favor the claims of creditors; for, if the creditors of a tenant could compel payment of their debts out of the tenant's land, the latter might be unable to perform his services to his lord, and if the creditors of a deceased tenant could compel payment of their debts out of the land which had descended to the tenant's heir, the latter might be unable to perform the services to his lord, the obligation to perform which had descended to him with the land. Hence, in English-speaking countries, the rights of creditors against the land of their debtors depend almost wholly upon statute. A judgment creditor could, indeed, at common law take in execution

¹ In *Parker v. Dee*, *supra*, the plaintiff having obtained an account, the defendant pressed for a dismissal of the bill; but Lord Nottingham said (1 Eq. Cas. Abr. 130, pl. 5, 2 Ch. Cas. 201): "When this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

² See Vol. 2, p. 259; Vol. 3, pp. 238, 242.

³ See *Parker v. Dee* and *Pigott v. Nower*, *supra*.

(by cutting and gathering) any crops which he might find on his debtor's land,¹ but he could not acquire any right to the possession of the land,—still less could he sell it, or become himself the owner of it.² And even when the Legislature interfered in favor of judgment creditors (as it did in the thirteenth year of Edward I.),³ by giving them the right to have their debtors' land extended (*i.e.*, the annual value of it appraised, and the possession of it delivered to them, with the right to retain such possession at the appraised value, until by that means their judgments were satisfied), such right was limited to one half of the debtor's land; and it was not till nearly six hundred years later (namely, in 1838)⁴ that judgment creditors acquired in England the right to have the whole of their debtors' land thus extended; and to this day they cannot, in England, either sell their debtors' land upon execution, or themselves become the owners of it.

What were the rights, at common law, of the creditors of a deceased debtor against the land of the latter which had descended to his heir? The answer is, that, as creditors of the deceased debtor, they had no rights whatever. As, however, the heir had a legal right to inherit all the land of which his ancestor died seised in fee, of which right the ancestor could not deprive him, so the ancestor had a right by deed to bind his heir to the extent of the land which descended from him to the latter. Hence, whenever a bond was given by which the obligor in terms bound not only himself, but also his heirs, the consequence was that, upon the death of the obligor, his heir became personally liable on the bond, just as if he had given it himself, except that his liability was limited to the land which descended to him. This liability of the heir was, however, limited to debts by specialty for which the heir was expressly bound. It was a privilege in which even debts by matter of record did not share. And even in respect to specialty debts for which the debtor's heir was expressly bound, the right of the creditor to proceed against the heir became

¹ This was done under the writ of *levavi facias*,—a writ which has long been obsolete, except in a few special cases. From it, however, we have derived the familiar term "levy,"—a term which is constantly applied, though not with strict accuracy, to a writ of *fieri facias*. Thus under a writ of *fieri facias* the sheriff is said to "levy" the amount due on the judgment, though the writ commands him to "make" that amount.

² See Sir William Harbert's Case, 3 Rep. 116-122a.

³ Namely, by statute of Westminster 2, c. 18.

⁴ By 1 & 2 Vict. c. 110, § 11.

very precarious; for, first, if the heir sold the land which had descended to him before he was sued upon a bond of his ancestor (an action actually brought against the heir was notice to a purchaser), the right of the creditor was entirely defeated. He could no longer proceed against the heir, for his execution (as we shall see) was only against the land itself; and he could no longer have an execution against the land, for it had become the property of the purchaser. Secondly, after lands became devisable,¹ a debtor could entirely defeat his creditors' rights against his land by devising the latter; for the creditor would then have no right against the heir, as the latter would inherit nothing from his ancestor, and he would have no right against the devisee, as the latter would be under no obligation to him. These two mischiefs were, however, remedied soon after the English Revolution, by 3 & 4 Wm. & M. c. 14.

What was the remedy at law of a specialty creditor against an heir? In some respects it was very similar to his remedy against the executor, but in other respects it was materially different. First, the creditor brought an action of debt against the heir upon the bond; but as the heir was personally liable, the action was in the *debet et detinet*, — not in the *detinet* only, as in case of an action of debt against an executor. Secondly, if the heir had no assets by descent, he must plead that fact as an affirmative defence;² otherwise it would be assumed that he had sufficient assets.³ If he did so plead, and the plaintiff traversed his plea, and issue was joined upon the traverse, the question at the trial was, whether the heir had *any* assets by descent. If the jury found that he had not, of course their verdict was in his favor; but if they found that he had assets, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would have judgment for his entire debt against the heir personally.⁴ If the heir had some assets, but yet wished to guard against any liability beyond such assets, he must plead that he had no assets except what were specified in his plea,

¹ By 32 Henry VIII. c. 1.

² The plea by which such a defence is set up is called a plea of *riens per descent*. See *supra*, p. 110, n. (1).

³ Henningham's Case, Dyer, 344 a; Brandlin *v.* Millbank, Carth. 93, Comb. 162; Smith *v.* Angel, 7 Mod. 40, 1 Salk. 354; 2 Ld. Raym. 783; Hinde *v.* Lyon, 2 Leon. 11; Davy *v.* Pepys, Plow. 438 a.

⁴ 21 E. 3, 9 b, cited in Davy *v.* Pepys, Plow. 438 a, 440. Such a judgment is called a *general* judgment against the heir.

and then he must specify and describe the assets which he had by descent. If the heir so pleaded, and the plaintiff did not choose to controvert the truth of the plea, the latter could take judgment for his entire debt, his execution, however, to be limited to the assets in the heir's possession.¹ If, however, the plaintiff traversed the plea, and issue was joined on the traverse, the question at the trial was whether the heir had any more assets than he had admitted. If the jury found that he had not, their verdict must be in his favor, and hence the plaintiff lost the benefit of such assets as the heir admitted that he had.² If the jury found that the heir had more assets than he had admitted, to ever so small an amount, they must find a verdict for the plaintiff, on which the latter would be entitled to a judgment for his entire debt against the heir personally.³ It will be seen, therefore, that judgments against heirs differed from judgments against executors in two particulars; namely, first, that a judgment against an heir was always for the full amount of the plaintiff's debt, though the execution might be limited to the assets in the heir's possession; secondly, that, whenever a judgment against an heir rendered him personally liable, the judgment was against him personally in form, as well as in legal effect. The reason of the first of these differences was that an executor who admitted a limited amount of assets in his hands, did not specify such assets, but stated their value in money; and hence the proper way of limiting the executor's liability to the amount of assets in his hands was by limiting the judgment to the amount of money admitted by the executor to be the value of the assets in his hands. An heir, on the other hand, who admitted a limited amount of assets, specified and described such assets, but did not state their value. Indeed, as we shall see presently, the only question, as to the value of such assets, was as to their annual value, and that was not ascertained till after an execution had issued; and hence the only way of limiting the heir's liability was by limiting the execution to the specific assets in the heir's possession. The reason of the second difference was that, as the heir was bound by the bond, and as the assets which he had received by descent were as much his own as any of his

¹ Anon., Dyer, 373*b*, pl. 14; *Davy v. Pepys*, Plow. 438*a*. Such a judgment is called a *special judgment against the heir*.

² See 1 Rol. Abr. 929 (B.), pl. 2.

³ *Hinde v. Lyon*, 2 Leon. 11; *per Holt*, C. J., in *Smith v. Angel*, 7 Mod. 40, 44. See *supra*, p. 120, n. (4).

other property, there was no reason why a judgment against him should not bind him personally, in form as well as in legal effect, unless he employed the proper means for limiting the judgment to the assets by descent in his possession.

In respect to the mode in which it was enforced, a judgment against an heir differed widely from a judgment against an executor. A general judgment against an heir, *i.e.*, a judgment which was not limited to the assets which he had by descent, did not differ at all, either in its form or in respect to the mode in which it was enforced, from ordinary judgments. On the other hand, a special judgment against an heir, *i.e.*, a judgment which was limited to the assets which he had by descent, could be enforced only against such assets. What was the nature of the execution which issued on such a judgment? At common law, as well as by statute in England, the only kind of execution against land was (and is) an extent.¹ Ordinarily, as has been seen, the land of a judgment debtor could not be taken on execution at common law, and even when an extent was given by statute it was limited to one half of the land belonging to the judgment debtor; but a judgment against an heir on the obligation of his ancestor, *i.e.*, when the judgment was limited to the assets which the heir had by descent, was an exception to the general rule in both of the foregoing particulars; and the reason is obvious. If such a judgment could not have been satisfied out of the land which had descended to the heir, it could not have been satisfied at all, and so would have been worthless.² Therefore, an extent could be issued on such a judgment at common law; and whenever an extent issued at common law,³ it went against all the land that was liable, the arbitrary limitation of an extent to one half of the debtor's land existing only by statute.

Such, then, being the remedy provided by the common law for enforcing against an heir an obligation imposed upon him by his

¹ See *supra*, p. 119. The reader must not be misled by the name of a writ of *elegit*. This name (which was taken from a word which the writ always contained when legal proceedings were in Latin) has nothing to do with the nature or legal operation of the writ. Every *elegit* is an extent, though not every extent is an *elegit*. An extent made under an *elegit* differs from other extents only, first, in being made under the authority of a statute, and, secondly, in being limited to one half of the land.

² See Sir William Harbert's Case, 3 Rep. 11 b, 12 a.

³ An extent at the suit of the king is the typical case of an extent at common law. Land could always be taken in execution to satisfy a judgment in favor of the king.

ancestor, was there any sufficient reason for permitting the owner of such an obligation to sue in equity? It may be admitted at once that the reason which had, perhaps, the greatest force in the case of an executor, namely, the incompetency of a jury to take an account, had but little force in case of an heir; for as against an heir there was no account to be taken, and the question, what land an heir had by descent, was not an unfit question for a jury to deal with. There were, however, other reasons for permitting an heir to be sued in equity, which are believed to have been abundantly sufficient. First, when an heir alleged that he had not sufficient land by descent to enable him to perform an obligation imposed upon him by his ancestor, justice required that it be ascertained what land he had by descent; and yet all that the common-law courts did, or could properly do, was to ascertain whether he had *any* land by descent, or any more than he had admitted having. Secondly, in order to ascertain how much land an heir had by descent, or whether he had any, or whether he had any more than he had admitted having, it must first appear of what land the ancestor died seised in fee simple, and that must be shown by the creditor; and yet it is a fact which the creditor would not presumably be able to show without assistance from the heir. Justice, therefore, required that the heir should state upon oath of what land his ancestor, to his knowledge, died seised in fee simple;¹ and yet equity alone could compel an heir to do this, an heir not being amenable to the ecclesiastical courts, nor required to exhibit an inventory of his ancestor's lands. But, thirdly, the part of the common-law remedy which was most strikingly inadequate was the execution. An extent is a very unsatisfactory execution at best; for it requires the creditor to take possession of the land, and hold it (in effect) as a lessee, at a rent fixed by a sheriff's jury, until he obtains satisfaction of his judgment by retaining the rent; and it may be years before this object will be accomplished. As against an heir, however, the inadequacy of such an execution is still more marked. When a debtor dies, as it is then certain that the property which he leaves behind him constitutes the only means by which his debts will ever be paid, justice to his creditors requires that his property be applied at once to the payment of his debts. When, therefore, a creditor obtains a judgment which must be satisfied, if at all, out of his

¹ See *supra*, p. 114.

debtor's land, the judgment ought to be satisfied out of the *corpus* of such land, and there is no propriety in compelling the creditor to wait until he can obtain satisfaction out of the income. But this is not all; for, if there were several creditors, they could enjoy the land only in succession, and hence, when one had obtained a judgment and extended the land, all the others must wait till his debt was satisfied, and the last one must wait till all the others' debts were satisfied; and yet the *corpus* of the land might be sufficient to pay all the creditors in full. Fourthly, as an extent had no retroactive effect, there was no way, at common law, of reaching the income of the land between the ancestor's death and the making of the extent; and yet the land could not be extended until an action had been brought against the heir, and a judgment recovered.

For the foregoing reasons, it seems never to have been doubted that an heir could be sued in equity by a creditor of his ancestor. Equity treated an heir just as it did an executor, *mutatis mutandis*, i.e., it held him liable only to the extent of assets which he had received by descent; but it held that the *corpus* of such assets, as well as the rents and profits produced by them subsequently to the ancestor's death, should be applied immediately to the payment of those specialty debts of the ancestor for which the heir was bound. Accordingly, when, upon a bill filed against the heir by the owner of such a debt, the plaintiff had proved his claim, and the court had ascertained what land the heir had by descent, a decree was made that such land, or a sufficient portion of it, be sold under the direction of a Master, that the heir execute a conveyance pursuant to the sale, and that the proceeds of the sale be applied, so far as necessary, to the payment of the plaintiff's claim, the surplus, if any, going to the heir;¹ and, if necessary, the decree further directed an account by the heir of the rents and profits of the land between the death of the ancestor and the sale.²

I have said that debts by matter of record did not share with specialty debts the advantage of being secured by the liability of the heir. The former, however, in turn had advantages of their own, which they did not share with debts of any other class. First, all matters of record (and therefore recognizances and stat-

¹ See Seton, *Decrees* (1st ed.), pp. 82, *et seqq.*; Eddis, *Administration of Assets*, c. 7.

² Davies *v.* Topp, 1 Bro. C. C. 524, Seton, *Decrees* (1st ed.), pp. 95-8; Stratford *v.* Ritson, 10 Beav. 25; Schomberg *v.* Humfrey, 1 Dr. & W. 411.

utes) stand upon the same footing as judgments in this respect; namely, that they neither require proof, nor can be impeached. Therefore, an execution can issue upon a recognizance or statute just as upon a judgment. Secondly, the statute of Westminster 2 (13 Edward I.), c. 18, having given to conusees of recognizances, as well as to judgment creditors, a right to extend one half of the land of their conusors or judgment debtors, this right was held to constitute a general lien upon the land of the conusors or judgment debtors, as well that which they owned when the recognizance was acknowledged or the judgment recovered, as that which they afterwards acquired; and the death of a conusor or judgment debtor did not affect this lien, or the right to issue an execution to enforce it, otherwise than by making it necessary for the conusee or judgment creditor first to issue a *scire facias*. Hence, such conusee or judgment creditor, while he could not maintain an action against the heir of the deceased conusor¹ or judgment debtor, and had no claim upon more than one half of the land which had descended to such heir,² yet he could (subject only to the condition of first issuing a *scire facias*) issue an execution, and have one half of such land extended, including not only the land which the conusor or judgment debtor owned at the time of his death, but also the land which he owned when the recognizance was acknowledged or the judgment recovered, or had owned at any time since, whoever might be the owner of it when the extent was made; and this was a right of which the creditor could not be deprived except by his own act.

Conusees of statutes, in respect to their rights against the land of their conusors, had an advantage even over judgment creditors and conusees of recognizances; for the statutes, from which the rights of the former were derived, authorized them to have all the land of their conusors extended instead of one half of it.³

Could then a judgment creditor, or a conusee of a recognizance or statute, instead of resorting to his *scire facias* and execution at law against the land of his deceased judgment debtor or conusor, file a bill in equity against the owner or owners of such land? As against any one but the heir or devisee of the judgment debtor or conusor (*i.e.*, as against any one who had acquired his title before

¹ Sir W. Harbert's Case, 3 Rep. 11*b*, 15*a*; Anon., Dyer, 271*a*, pl. 25; Stileman v. Ashdown, 2 Atk. 608.

² See Stileman v. Ashdown, *supra*.

³ Sir W. Harbert's Case, 3 Rep. 11*b*, 12*a*.

the death of the latter), he clearly could not; for as to such a person his position would not be at all changed by the death of the judgment debtor or conosor, nor would he have any equity against him. Could he file a bill against the heir or devisee of the deceased judgment debtor or conosor to reach the land which had descended or been devised to him? In favor of a negative answer to this question, it may be said that the execution at law against land was not open to so great an objection in the mouth of a creditor by matter of record as in the mouth of a specialty creditor; for the rights of creditors by matter of record were always successive, priority of time giving priority of right, while the rights of all specialty creditors were concurrent and equal. Still, the question must be answered in the affirmative, equity holding that every creditor of a deceased debtor is entitled to have all the debtor's property, so far as he has a claim upon it, applied immediately to the payment of his debt; and therefore the relief given, in the case now under consideration, was the same that was given upon a bill by a specialty creditor, namely, a sale of the land (or of one half of it, as the case might be), with an account of the rents and profits, if necessary, until the sale took place.¹

There is also another independent ground upon which the jurisdiction of equity over creditors' bills against heirs or devisees may be sustained, namely, that of preventing a multiplicity of suits. To a bill by a creditor against an executor, an heir or devisee was never a necessary party; but to a bill by a creditor against an heir or devisee as such, the executor was always a necessary party.² The reasons for the difference are these: first, every creditor of a deceased debtor is entitled by law to be paid out of the debtor's personal estate, while only privileged classes of creditors are entitled to be paid out of his land; and therefore every creditor who is entitled to sue the heir or devisee of his deceased debtor, is entitled *a fortiori* to sue his executor, while the converse, of course, does not hold. Secondly, as between the personal estate and the land of a deceased debtor, the debts of the latter fall by law upon the personal estate, and therefore the land is entitled to be exonerated from the debts by the personal estate. In other words, the land, even when it is liable to the creditor, is by law liable

¹ *Stileman v. Ashdown*, 2 Atk. 477, 481, 608, Ambl. 13.

² *Knight v. Knight*, 3 P. Wms. 331; *Plunket v. Penson*, 2 Atk. 51; *Robinson v. Bell*, 1 De G. & Sm. 630.

only as surety for the personal estate, which is the principal debtor. Therefore, though the creditor is entitled to go against the land or the personal estate, at his pleasure,¹ yet, if he wish to go against the land in equity, he will be required to go against the personal estate at the same time, by making the executor a co-defendant to his suit, and praying relief against him as well as against the heir or devisee; and thereupon the court will direct the personal estate to be applied in the first instance to the payment of the plaintiff's debt, and will direct so much only of the debt to be paid out of the land as shall remain unpaid after the personal estate has been exhausted.² If, however, an heir or devisee could not be sued in equity by a creditor of his ancestor or testator, it would follow that three actions or suits might be necessary to accomplish what can be accomplished without difficulty by one suit in equity; for the creditor might first sue the heir or devisee at law, and having thus obtained payment of his debt in part, he might then sue the executor at law or in equity for the remainder; and, lastly, the heir or devisee might, on the principle of subrogation, sue the executor in equity, and recover back what he had been compelled to pay; clearly, therefore, whenever a creditor who sues an executor in equity, is entitled also to call upon the heir or devisee for payment of his debt, he may make the latter a co-defendant to his suit, on the principle of preventing a multiplicity of suits.

C. C. Langdell.

[*To be continued.*]

¹ Quarles *v.* Capell, Dyer, 204 *b*, pl. 2; Davy *v.* Pepys, Plow. 438 *a*, 439 *a*; Davies *v.* Churchman, 3 Lev. 489.

² Seton, Decrees (1st ed.), 82, *et seqq.*

ON CONTRACTS IN RESTRAINT OF TRADE.

IT is commonly understood that the general rule of law on this subject is, that a condition in a contract in restraint of trade is valid even if unrestricted in point of time, but is invalid if unrestricted in extent of territory. If asked to explain the latter part of this statement, the answer would probably be, without critical examination of the subject, that a condition in restraint of trade covering the whole country, kingdom, or perhaps even the whole of one of the United States, is invalid, while, in the latter case, if the condition were restricted, so as not to cover the whole of a State, it would be valid. It is the aim of this paper to show, *first*, that this is not the law; *second*, that the law is that a condition in restraint of trade, unrestricted as to territory, even though it covers the whole of a State, the United States, or the whole world, is valid *if reasonable*; while it is invalid *if unreasonable*, even though the condition cover but a part of the State or country; and, *third*, the effect of the application of this rule of reasonableness to the determination of the vital question, arising in consequence of the new-fashioned "trusts."

¹ The old error that covenants in restraint of trade are bad, is repeated even in so late a case as that of *Davies v. Davies*,² in 1887, by Cotton, L. J., who says, "And in the year books in Henry V.'s reign, there was a case which laid down generally that covenants in restraint of trade are bad (2 Hen. 5, Term. Pasch. pl. 26)." But the condition in that case was in fact limited to one town in space and to half a year in time, and the opinion that it was against the common law was expressed by one judge only

¹ 1 P. Wms. 181. See also the note to this case in 1 Smith's Leading Cases, 705, and 9th Am. ed., which, however, is extremely unsatisfactory, except as a list of authorities there being no elucidation of principle therein. In 2 Parsons on Contracts, 748, note (s), may be found a list of principal cases on this subject, stated in chronological order, and a table of such cases may also be found in *Avery v. Langford*, Kay's Rep. 663, at 667, 668. See also the notes by Francis Wharton to *Smith v. Tel. Co.*, 11 Fed. Rep. 1, and to *Sharp v. Whiteside*, 19 Fed. Rep. 156. As to conditions in restraint of artists, etc., see 1883, *McCaull v. Braham* (N. Y.), 16 Fed. Rep. 37, and p. 42, an excellent note by B. F. Abbott. See also 3 Am. & Eng. Ency. of Law, 882, note 4.

² L. R. 36 Ch. Div. 359, at p. 381.

(Hull), as is explained in the note, p. 240, 4 Law Q. Rev. This is the picturesque case, so to speak, often referred to, in which this same judge swore, "per dieu si le pl' fuit icy il irra al prison tanzgr. il uest fait fine au Roy"! No extended argument could so well show with what disfavor courts of old looked upon conditions in restraint of trade.¹

In the leading case of *Mitchel v. Reynolds*,² Parker, C. J., says that in many instances the general restraint throughout all England can be of no use to the obligee, — "for what does it signify to a tradesman in London what another does at Newcastle?" — thereby implying that if it did signify, the rule would not apply. He adds, "And surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." The question of the *reasonableness* of the condition in dispute is therefore here brought out as one of the points to be examined and determined. Yet for a long time this would seem to have been forgotten. But, little by little, courts, at first insensibly, then more of set purpose, inquired into the *reasonableness* of the particular condition restraining trade in question in each particular case, until now, as we shall see when we come to the late cases, the true test is recognized to be that of reasonableness.

Let us briefly review a few of the cases.

Mitchel v. Reynolds (1711).³ Debt on bond. An unlimited restraint as to space was held void, while a limited restraint was held good.

Bunn v. Guy (1803).⁴ In chancery, on a question of the marshalling of assets. An agreement not to practise law within 150 miles of London was held valid.

Pierce v. Fuller (1811).⁵ Debt. An agreement not to run a stage on a certain route was held valid, because reasonable and useful (p. 226).

Stearns v. Barrett (1823).⁶ Covenant. An agreement for the exclusive use in two of the United States of certain machines by one party, and the same by the other party in the other States, was held valid (p. 450).

Homer v. Ashford (1825).⁷ Covenant. At p. 326 of the

¹ And see also the statement of the law by Morton, J., in 1837, in *Alger v. Thatcher*, 19 Pick. 51.

² 1 P. Wms. 181, at p. 191.

³ 8 Mass. 223.

⁴ 1 P. Wms. 181.

⁵ 1 Pick. 443.

⁶ 4 East, 190.

⁷ 3 Bing. 322.

opinion we read: "Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in *the Kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself." This implies that if there were, the restraint would be upheld.

Horner v. Graves (1831).¹ Assumpsit, on breach of agreement that defendant, a dentist, would abstain from practising over a district 200 miles in diameter. The condition was held to be *unreasonable*, and therefore void. Tyndall, C. J., at p. 743, said: "But the greater question is, whether this is a reasonable restraint on trade. And we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. . . ." It follows, then, that if the restraint interferes with the interests of the public, it is unreasonable, and will not be upheld by the courts. This is to be borne in mind when we come to the question of the powers of the courts over our new-fashioned "trusts."

Hitchcock v. Coker (1837).² Assumpsit, for breach of agreement not to carry on the trade of a druggist in Taunton, or within three miles thereof. Held reasonable and valid. See a good statement of the law by Tyndall, C. J., at p. 454.

Ward v. Byrne (1839).³ Debt on bond, the condition being that the defendant was not to follow the business of selling coal for nine months. Held void, because *unreasonable*, but not because it was unlimited in space. At p. 562 Parke, B., says: "The limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made. . . ."

Whittaker v. Howe (1841).⁴ Injunction. A restraint against practising as a solicitor in all England was held *reasonable* and valid.

Mallan v. May (1843).⁵ Covenant. An agreement not to carry on business as a dentist in London or in any towns or places in England or Scotland where the plaintiffs might practise, was held valid as to London, because reasonable, but invalid as to

¹ 7 Bing. 735.

² 5 M. & W. 548.

³ 11 M. & W. 653.

⁴ 6 Ad. & El. 438.

⁵ 3 Beav. 382.

the rest, because unreasonable. The old notion that a restraint unlimited as to space is necessarily invalid may be said to have been destroyed by this time. Neither of these restraints were unlimited as to space, yet one was held valid because reasonable, while the other was held invalid because unreasonable. At p. 667 Parke, B., says : "We conceive that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid."

Jarvis v. Peck (1843).¹ Bill in equity, in a foreclosure suit on bond and mortgage, the condition being that the defendants would not use a certain method of converting cast iron into malleable iron. Held valid, as a sale of a business secret, although unlimited in time or space.

Green v. Price (1845).² Covenant. An agreement not to carry on the trade of a perfumer within the cities of London or Westminster, or within 600 miles thereof, was held to consist of divisible covenants, good as to London and Westminster, but bad as to the rest ; following *Mallan v. May*, *supra*.³ If the rule were, as commonly stated, that a restraint limited as to space is valid, but one unlimited as to space is void, both restraints in these two cases would be held invalid. But one is valid because *reasonable*, the other is invalid because *unreasonable*.

Lawrence v. Kidder (1851).⁴ Covenant or assumpsit. On demurrer to the declaration. An agreement not to manufacture or sell palm-leaf beds, etc., for five years in all the territory west of Albany, in the State of New York, was held invalid, the restriction embracing too large a territory. Now, if there were any such a general principle as that sometimes asserted, that a condition in restraint of trade is valid if it covers less than the whole State or Nation, while it is invalid if it covers the whole State or Nation, this case cannot stand. It can only be supported upon the ground that the condition was *unreasonable*, with all that follows therefrom ; *i.e.*, that it was more than was necessary for the protection of the complainant, and was injurious to the public.

Dunlop v. Gregory (1851).⁵ Covenant. A contract not to run steamboats between New York and Albany was held valid,

¹ 10 *Paige*, 118.

² 13 *M. & W.* 695, affirmed 16 *M. & W.* 346.

³ 11 *M. & W.* 653.

⁴ 10 *Barb.* 641.

⁵ 6 *Selden*, 241.

because *reasonable*, and the restraint of the covenantor was not larger than is necessary for the protection of the covenantee.

Tallis v. Tallis (1853).¹ Covenant. An agreement not to canvass for the sale of books in London or within 150 miles of the general post-office, or in Dublin or Edinburgh, or within 50 miles of either, or in any town of Great Britain or Ireland in which the plaintiff might have an establishment, was held good, on demurrer, it not appearing that the restraint was unreasonable.

Whitney v. Slayton (1855).² Debt on bond. An agreement not to engage in the business of casting iron within 60 miles of Calais, Me., for ten years (it not being a part of the State densely inhabited), was held valid; not because limited in space (as well as in time), but because it was a reasonable restriction.

Alcock v. Giberton (1855).³ Assumpsit. On demurrer to the declaration. An agreement not to make porcelain teeth (unlimited in time or space) was held valid. The decision of the court below, based upon the test whether the contract would be prejudicial to the public interest, was sustained. What is this but another way of saying that the contract was a *reasonable* one? This case is sometimes cited as sustainable upon the ground that it was a sale of a trade secret; but the opinion does not rest upon this ground.

Jones v. Lees (1856).⁴ Covenant. An agreement not to make or sell slubbing-machines during the fourteen years of the patent, without using plaintiff's invention, was held valid, because *reasonable*, although unlimited as to space. Pollock, C. B., said: "If the covenant had been that neither the defendant nor his executors would make any of these machines for a thousand years, that would, no doubt, have been an unreasonable restraint. . . ."

Mumford v. Getling (1859).⁵ Assumpsit, for the recovery of fifty pounds stipulated damages, the defendant having, in violation of his agreement, travelled for another house. Held valid, because reasonable.

Harms v. Parsons (1863).⁶ Bill in equity to rectify an assignment. An agreement not to buy, sell, or manufacture horse-hair stuff except for the benefit of the plaintiffs, within 200 miles of B., was held valid, because reasonable. The brief statement at p. 248 of the argument of the counsel for the complainant

¹ E. & B. 391.

² 5 Duer, 76.

³ 7 C. B. N. S. 305.

⁴ 40 Me. 224.

⁵ 1 H. & N. 189.

⁶ 32 L. J. Ch. 247.

is unanswerable: "A general covenant, therefore, to retire from trade altogether might reasonably be taken from a telegraphic instrument-maker; Bass' and Allsopp's Ales were known the world over, and Mudie made no difficulty in sending books round the kingdom, and even abroad; a general covenant might also be asked from them."

Keeler v. Taylor (1866).¹ Bill in equity for an account, etc. On demurrer to bill for an account upon an agreement to pay \$50 for all scales made for any one except the complainant. The agreement was held invalid, because unreasonable.

Taylor v. Blanchard (1866).² A contract not to manufacture or sell shoe-cutters in the State of Massachusetts was held invalid. But in the light of later, more authoritative, because better-considered, cases, I submit that this and other old cases included in the list of cases at the head of this paper, as well as *Bishop v. Palmer*,³ are not good authorities now, and would not be followed.

Wright v. Ryder (1868).⁴ An agreement not to run a steam-boat for ten years in the waters of California, etc., was held void. Although it was held that a condition in restraint of trade running through the whole State is void, the court recognized insensibly the true test to be that of *reasonableness* (p. 358). We need not examine this case further, because it was overruled in the U. S. Supreme Court, 20 Wall. 64, which we will examine when we come to it.

Leather Cloth Co. v. Lorsont (1869).⁵ Bill in equity to restrain violation of an agreement not to carry on, in any part of Europe, the manufacture of certain leather cloth. The agreement was held valid, because reasonable. James, V. C., said (p. 90): "The truth is that all the cases, when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties." So in 1886, in *Smith's Appeal*,⁶ Trunkey, J., well states: ". . . In such case, the same public policy enables him to enter into any stipulation, however restrictive it is, proved the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

¹ 53 Penn. St. 467.

⁴ 36 Cal. 342.

² 13 Allen, 370.

⁵ 39 L. J. Ch. 86; s. c., L. R. 9 Eq. 345.

³ (1888) 146 Mass. 469.

⁶ 6 Atl. Rep. 251, at 253.

Mandeville v. Harman (1886).¹ Injunction, to restrain the defendant from violating his agreement not to engage in the practice of medicine or surgery in Newark at any time. The application was denied, because the reasonableness of such a restraint had not been determined in that State. But the court recognized the test to be that for which we are now contending.

Before we examine the later cases let us now sum up.

(a.) We see an ever-increasing tendency all through these and other cases on our lists, but which we cannot stop to examine in detail, towards an abandonment of the supposed and, indeed, commonly misstated principles of the earlier cases, and towards the consideration of each case, especially in courts of equity, upon the question of *reasonableness*, as applied to the particular case.

(b.) The majority of the older cases that would seem to militate against this view were cases arising at law in debt upon bond, or in covenant, in which cases the common-law court, of course, construed strictly the condition of the bond or the terms of the covenant. If it be urged in reply that "Equity follows the law," the answer is, that depends upon how this maxim is to be construed. Does it mean that equity is to follow the law, slavishly, as its master, or intelligently, as its guide? Unfortunately there has been a strong tendency, in the United States especially, to follow it as its master. In this country this probably arises from the fact that our judges and lawyers are, first and foremost, common-law judges and lawyers, and even in a court of equity they are only secondarily equity judges and lawyers. In England, under the old system, equity judges and lawyers were always first and foremost equity judges and lawyers. They were not hampered, in their application of equitable principles, by a previous strict course of education in the common law, or by the too prevailing admiration of American lawyers for the narrow and harsh principles of that essentially scholastic and metaphysical system. Therefore we find, as a general rule, that the English Chancery Courts are stronger than ours, and apply equitable principles in a broader spirit, regarding less the narrow limitations of the common law. In other words, they follow the common law as a guide, and not as a master.

(c.) We have examined indiscriminately cases in which the restraint was limited, and those in which it was unlimited, as to

space. This was done advisedly, to show that the true question is that of *reasonableness*, and not of limit in space.

We will now examine the recent leading cases which, I submit, establish the law in consonance with the views herein expressed.

Oregon Steam Nav. Co. *v.* Winsor (1873),¹ overruling Wright *v.* Ryder.² An agreement not to run a certain steamboat within the waters of California for ten years was held valid. In the excellent opinion of the court by Bradley, J., although the element of reasonableness is admitted (p. 69), we find the common error as to the law on this subject again perpetuated (p. 67). "A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade," etc. The opinion is important because it recognizes the fact that this is substantially one country, and that it would involve too narrow a view of the subject to condemn as invalid any contract not to carry on a particular business within a particular State (p. 57). A broader view must guide us, in the present day of extended commerce, telegraphs, railroads, etc.; for the limits that were unreasonable fifty years ago are plainly reasonable now.

Roussillon *v.* Roussillon (1880).³ An unlimited restraint against selling certain champagne was held reasonable and valid. Let it not be urged that this case has been overruled by the later case of Davies *v.* Davies.⁴ "While Cotton, L. J., showing great willingness, if not anxiety, to overrule it, based his opinion upon the ground that the restriction was void, because unlimited in space, Bowen, L. J., did not put his decision on that ground, and Fry, L. J., adhered to his opinion in Roussillon *v.* Roussillon. That Davies *v.* Davies was not received in England as overruling the last-named case, see note to this case in Law Quarterly Review, Vol. 4, p. 240."⁵ The case of Roussillon *v.* Roussillon is a very strong one, and without quoting from it at length, I would, however, call attention to the masterly comparison of the conflicting cases by Fry, J., and the conclusion he comes to, *i. e.*, there is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.

¹ 20 Wall. 64.

³ L. R. 14 Ch. D. 351.

² 36 Cal. 342, above cited.

⁴ L. R. 36 Ch. D. 359.

⁵ By Stiness, J., in Herreshoff *v.* Boutineau (R. I., April 14, 1890), 19 Atl. Rep. p. 712, at 713. This case will be cited again in its order.

Diamond Match Co. *v.* Roeber (1887).¹ An agreement not to make or sell, except in the service of the purchaser, certain matches, within 99 years, in any State or Territory except Nevada and Montana, was held valid. The very able and full opinion in this case, in common with the last cases cited, dwells upon the extension of trade and commerce through the improvements made in the use of steam and electricity, and the consequent necessity of relaxing the rigor of the old doctrines on this subject.

The last case on this subject, indeed the one in which the writer cited the above cases on his brief for the complainant, and presented the above argument, is that of Herreshoff *v.* Boutineau (1890).² A temporary injunction was denied, the court intimating that the law was not as the complainant maintained.

The bill was for an injunction to restrain the defendant from violating his agreement not to teach the French or German languages for a year, within the State of Rhode Island. After argument, upon demurrer to the bill, the court held, in a very able opinion by Stiness, J., that neither in England nor in this country is there a rule of law that a restraint upon trade extending throughout the State is necessarily invalid. They then proceeded to examine the *reasonableness* of the restraint in question, and came to the conclusion that it was an unreasonable restraint, because it extended more protection to the complainant than he required, and thus, without benefiting him, it oppressed the respondent, and deprived people of the chance which might be offered them, to learn the French and German languages of him. Owing to the imperfect system of reporting cases in Rhode Island, no summary of points presented and of cases cited will appear in the report of this case (or of other cases) in the forthcoming volume of Rhode Island Reports, and therefore this paper may assist some one in the future, having the same ground to go over.

We conclude, therefore, that the true test, in considering the legality of a condition or covenant in restraint of trade, is not whether the restraint covers the whole State or Nation, but it is whether the restraint is *reasonable*; and in determining this question the court will inquire whether it is necessary for the protection of the complainant, and is not injurious to the public. The latest decisions of the United States Supreme Court, the Court of Chancery in England, the Court of Appeals of New York, and the Supreme

¹ 106 N. Y. 473.

² 19 Atl. Rep., p. 712.

Court of Rhode Island, taken in their order as rendered, are decisive of this subject, especially when an analysis of the previous conflicting cases shows the doctrine here contended for to be but the fruition of the application of this principle, which, though often unconsciously, was applied in many of those cases.

What bearing has this principle upon the solution of the questions arising under "Trusts"? The learned Dr. Dwight in an article on Trusts (3 Political Science Quarterly, 592 (Dec., 1888), also published as Appendix A to the minority report of the Committee on Manufactures, 50th Congress, 2d Session, H. R. Rep. 4165, Part 2), maintains that the rules governing contracts in restraint of trade are not applicable, because persons constituting "trusts" become partners, and, as is well known, partners are not subject to these rules. But with all deference to the opinion of so able and learned a writer, I cannot accept this conclusion, certainly not in those cases where a "trust" is a partnership or combination of corporations or of other partnerships. Dr. Dwight thinks it is very doubtful whether the offence of engrossing, forestalling, or regrating (buying to sell again) ever existed at the common law, independent of the statutes of 5 & 6 Edward IV., cap. 14, and that when these statutes were repealed courts had no authority to punish offenders. If this be so, in the absence of statutory authority the courts cannot now punish offenders of this class, and therefore they cannot reach "trusts," unless they do so on other grounds. On the other hand, upon proper application to a court of equity, has not that court jurisdiction to determine whether or not it is *reasonable* to allow as valid a secret combination or partnership of this nature, whereby a number of corporations or of partnerships, or even of individuals, at the expense of the public, can parcel out production, supply, and consumption of the necessities of life, or of anything else, not according to the usual laws of demand and supply, but according to the will of an inner circle, acting under delegated authority from constituents whose right thus to delegate their power or thus to use it themselves is doubtful?

If the wit of man has brought into existence this new thing, this Frankenstein, surely the wit of man will also prove equal to the task of determining how it shall be rendered amenable to the law of the land and the public good.

Amasa M. Eaton.

PROVIDENCE, R.I., September, 1890.

HARVARD LAW REVIEW

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THE new course on the Peculiarities of Massachusetts Law and Practice, the foundation for which has been furnished by a generous friend of the Law School, is a valuable addition to the work of the School. This is understood to be part of a plan for giving similar instruction in the law and practice of other leading States when funds can be obtained for the purpose. Mr. Frank Brewster, a graduate of the class of 1883, has been appointed to conduct the present course.

THE following list shows the number of students in the Law School on October 10th. A reference to the right-hand column will show the gain or loss as compared with the number present October 10, 1889 :—

October, 1890.	October, 1889.
Third Year 43	Third Year 51
Second Year 73	Second Year 60
First Year 97	First Year 77
Special Students 60	Special Students 56
Total 273	Total 244

We insert below an extract from the Harvard Law School Association circular of October 1, 1890, sent us by the Treasurer of the Association :—

The Association, organized September 23, 1886, now numbers 1,519 members, representing forty-three States and Territories of the United States, the Dominion of Canada, and various foreign countries, and distributed as follows :—

Alabama,	5	Georgia,	10	Maryland,	21
Arkansas,	3	Illinois,	60	Massachusetts,	619
California,	37	Indiana,	12	Michigan,	15
Colorado,	15	Iowa,	11	Minnesota,	21
Connecticut,	15	Kansas,	3	Mississippi,	1
Delaware,	9	Kentucky,	16	Missouri,	40
Dist. Columbia,	27	Louisiana,	4	Montana,	3
Florida,	1	Maine,	27	Nebraska,	3

New Hampshire,	16	South Dakota,	1	Cape Breton Island,	1
New Jersey,	22	Tennessee,	5	New Brunswick,	20
New York,	189	Texas,	9	Nova Scotia,	10
North Carolina,	3	Utah,	3	U. S. of Colombia,	1
North Dakota,	1	Vermont,	4	Austria,	1
Ohio,	74	Virginia,	4	Japan,	2
Oregon,	4	Washington,	7	Harv'd Law School,	79
Pennsylvania,	48	West Virginia,	3		—
Rhode Island,	21	Wisconsin,	10		1,519
South Carolina,	1	British Columbia,	2		

The membership roll comprises the names of nearly one-half of the whole number of former students of the Harvard Law School, known to be living, and includes representatives from the classes of 1825, 1829, and from every class from 1831 to the present time.

The following table shows the growth in membership of the Association since the publication of the first regular report by the Council on April 1, 1887:—

April 1, 1887, total membership	.	.	.	560
January 1, 1888, "	"	.	.	642
January 1, 1889, "	"	.	.	822
January 1, 1890, "	"	.	.	963
September 15, 1890,	"	.	.	1,519

NOTICE TO THIRD-YEAR MEN.—The Harvard Law School Association offers a prize of one hundred dollars for the best essay on any of the following subjects:—

I. Rights and Remedies of Minorities in Political and Civil Corporations.

II. Constructive Trusts arising out of Fiduciary Relations.

III. Judicial Legislation: its legitimate function, if any, in the development of the Common Law.

Competition for the prize is open to members of the third-year class, only. Competitors are requested to limit their essay to 50 pages of manuscript, the usual legal quarto size. The essays must be sent to the Secretary of the Association, 220 Devonshire street, Boston, Mass., on or before April 15, 1891. The prize will be awarded at the meeting of the Association which is to be held in Cambridge, in June, 1891.

LOUIS D. BRANDEIS, *Secretary.*

AMONG the many recent articles on the subject of marriage is an interesting paper on "The Cause of the Increase of Divorce," by Mr. Sydney G. Fisher, of the Philadelphia bar, formerly a member of the Harvard Law School. He calls attention to the fact that while in most of the States at the beginning of the century the laws allowed substantially the same freedom of divorce as at present, it is only very recently that people have begun, to any great extent, to take advantage of these laws. It is an error therefore to attribute the increase in divorce to changes in the law. To say that the cause is a change in public opinion, is but truism. Mr. Fisher, therefore, proceeds to examine the origin and growth of public opinion. He finds that the theory of indissoluble marriage has been handed down from the middle ages; he examines in some detail the cases in the Ecclesiastical

Courts; states many absurd arguments which were put forward; and fails to discover any that will bear for one instant the light of modern criticism.

This doctrine of indissoluble marriage, however, was so forcibly impressed upon men's minds that it is only within the last thirty years that the world has really awakened to the fact that all the mediæval arguments for the indissolubility of marriage are sheer nonsense and superstition, and that there are no other arguments.

Herein, then, lies the cause of the increase of divorce. In Mr. Fisher's own words, —

"The arguments which upheld indissoluble marriage are gone, and the arguments which upheld semi-indissoluble marriage (if I may be allowed the word) are also largely gone. If we intend to stop divorce we must invent new arguments. Abstract or mystic theories will be of no avail. The subject is down on the bed-rock of utility. We must show by actual proof that divorce is an evil in its practical results. The statistician must take the place of the priest. Probably all that we shall be able to show will be that certain causes of divorce are evil in their results."

The possibility of inventing satisfactory arguments Mr. Fisher does not discuss, but in a later article, published in the "Philadelphia Sunday Press" of July 13th, 1890, he lays stress upon the importance of preserving "the family," and insists upon the necessity of scientific investigation of the whole subject.

Whatever opinion one may hold as to the existence of arguments, one cannot but join Mr. Fisher in his demand for thorough investigation, and render acknowledgment to him for his own careful research.

THE case of *Cochrane v. Moore* (25 Q. B. D. 57) is one of much interest. The well-known decision of *Irons v. Smallpiece* (3 B. & Ald. 551), that delivery was necessary to the parol gift of a chattel, though apparently settled law in this country, has not, as is shown by the collection of authorities in Professor Gray's note to *Irons v. Smallpiece*,¹ been treated with great respect in England; and later decisions had so far shaken it that Lopes L. J. felt bound to hold in *Cochrane v. Moore* at nisi prius that delivery was not necessary to a gift. But the Court of Appeal has upheld *Irons v. Smallpiece* in an elaborate judgment. The point was not, indeed, necessary to the decision; various considerations arose on the facts, among others the inquiry whether the subject-matter of the gift, the undivided fourth part of a horse, was susceptible of delivery at all; and as to the actual decision the court agreed with Lopes L. J. and dismissed the appeal. They discussed, however, at great length the question decided in *Irons v. Smallpiece*. The following passage from the opinion of Fry L. J. speaking for himself and Bowen L. J. indicates the grounds of the decision: "This review of the authorities [the opinion contains an extended investigation of the early reports and text-writers] leads us to the conclusion that according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or by deed and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts

¹ Gray's Cas. Property, 167.

of sale where the intention of the parties is that the property shall pass before delivery ; but that as regards gifts by parol, the old law was in force when *Irons v. Smallpiece* was decided ; " and he concludes that that case has not been overruled.

Among the citations collected by Professor Gray there are several which appear to have escaped the attention of the court. Lord Hardwicke's comment in *Ward v. Turner* (2 Ves. Sen. 431, 442) on the passage cited by Fry L. J. from Jenkins's Centuries, 109, Case 9, is interesting ; and the observation of Baron Parke in *Ould v. Harrison* (10 Ex. 572, 575) seems to throw light on the question discussed by the Lord Justice, of that eminent judge's attitude towards *Irons v. Smallpiece*.

The concurring opinion of the Master of the Rolls is noticeable. He draws a distinction — not wholly easy to understand — between " fundamental propositions of law " and the " amount or nature of the evidence which will satisfy a court of the existence of such a proposition." The former, he says, nothing but an Act of Parliament can alter, while the latter may be changed by judicial decision ; and since he concludes that delivery is not a piece of evidence to prove a gift, but " one of the facts which constitutes the proposition that a gift has been made," he feels constrained to hold that delivery must remain a necessary part of an oral gift until the law is altered by Parliament.

THE method pursued by the Master of the Rolls in *Cochrane v. Moore* and the theory which his opinion indicates of the nature of law call to mind the noteworthy address of Mr. James C. Carter on the " Origin and Growth of Law," delivered at Saratoga on August 21st, before the American Bar Association. Mr. Carter takes issue with Austin's definition of law as a command issued by a superior to an inferior. According to his own view, the lines of which were indicated to some extent in his earlier address on " The Provinces of the Written and the Unwritten Law,"¹ law is " not a command nor a body of commands, but consists of rules springing from the social standard of justice, and which have been framed in the course of the application of that standard through a long period to the transactions of men," — " the expression of the universal habits and customs of the people in their jural relations." The judge is an expert appointed to " search " for and declare the law, and to " affix to it his official mark by which it becomes more certainly known and authenticated." The office of the legislator comes after that of the judge in the order of social development, and his work is properly supplementary, — to assist society in forming new customs and in getting rid of old ones which it has outgrown. The true function of legislation closely resembles that of the judiciary in " affixing the public mark and authentication upon customs and rules already existing, or struggling into existence, in the habits of the people."

The address is undoubtedly one of great value and importance ; in some respects, however, it seems open to question. The reasoning, for example, by which Mr. Carter seeks to prove that a statute which is not enforced loses its character of law, is not wholly convincing. It may be admitted that a statute which is " not in accord with the habits,

¹ See 3 Harv. L. Rev. 279.

customs, and thoughts of the people" will not be enforced; but does it follow that it is the agreement with these habits and customs which "makes it law"? Again, in regard to Mr. Carter's treatment of the "universal and necessary maxim that every one is presumed to know the law," which he regards as inconsistent with Austin's conception of law, the objection suggests itself which has been expressed by Maule J. in *Martindale v. Falkner*,¹ that the maxim *ignorantia juris non excusat* is incorrectly expressed when put in the form of a presumption. The characterization of Bentham "as most accurately described by the vulgar designation of crank" has attracted some criticism which seems not undeserved. For if it be admitted that Bentham was a "crank," he was a great deal more than that,—he was one who has powerfully affected the development of the law.

It may be observed that criticisms of Bentham's and Austin's theory of law similar in their nature to Mr. Carter's are to be found in Sir Henry Maine's writings.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BILLS AND NOTES—PAYMENT.—Where the drawer of a check has no funds on deposit with the drawee for its payment, the payee need not present the check for payment before suing on the original demand, even if it can be proved that the drawee would have paid the check if presented. *Culver v. Marks*, 23 N. E. Rep. 1086 (Ind).

BILLS AND NOTES—TWO JUDGMENTS.—Recovery of judgment on a contract by the maker of a note to procure an indorser is no bar to an action on the note although the damages on the contract were assessed at the amount due on the note. *Vanuxem v. Burr*, 24 N. E. Rep. 773 (Mass.).

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A Minnesota statute empowers the railroad and warehouse commission of that State to compel a common carrier to adopt such charges as the commission "shall declare to be equal and reasonable." There is no provision for a hearing before the commission, and the Supreme Court of Minnesota declared that the statute made its decision final and conclusive as to what are "equal and reasonable" charges. The statute was held unconstitutional. The commission cannot be regarded as a court of justice, and since no appeal from its decision is allowed, the statute would deprive the carriers of their property "without due process of law." Bradley, Gray, and Lamar, J.J., dissenting. *Chicago, M., & St. P. Ry. Co. v. State of Minnesota*, 10 Sup. Ct. Rep. 462.

CONSTITUTIONAL LAW—HABEAS CORPUS.—An act of Congress gives the Circuit Courts power to issue writs of *habeas corpus* on the petition of a person alleged to be in custody "for an act done or omitted in pursuance of a law of the United States." Held, that the word "law" is there used in the broad sense, and includes any duty of a United States officer which can be inferred from the general scope of his duties.

The Constitution declares that the President "shall take care that the laws be faithfully executed. Held, that he can direct a United States marshall to accompany and protect from a threatened assault a justice of the Supreme Court while in the discharge of his official duties.

On both these points Fuller, C. J., and Lamar, J., dissented. *Cunningham v. Neagle*, 10 Sup. Ct. Rep. 658.

¹ "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." *Martindale v. Falkner*, 2 C. B. 719; and see 3 Harv. L. Rev. 165.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — MEAT INSPECTION LAW. — A Minnesota statute prohibits the sale of dressed meat within any municipal division of the State, unless the animal was inspected there within twenty-four hours before it was slaughtered. *Held*, unconstitutional, as it, in effect, prohibits the importation of meats slaughtered in other States. This violates both the clause of the Constitution giving Congress the power to regulate commerce and the one declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. *State of Minn. v. Barber*, 10 Sup. Ct. Rep. 862.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ORIGINAL PACKAGES. — An Iowa statute forbade the sale of intoxicating liquors within the State except in certain specified cases. *Held*, unconstitutional, in so far as the statute prohibited the sale of liquors by a foreign non-resident importer in the packages in which they were brought from another State. Such a provision encroaches upon the power of Congress over interstate commerce, for this power does not stop at the boundary of the State, but can follow the article imported until it becomes mingled with the common mass of property within the State.

This statute is more than a police regulation. The importation of liquors from one State into another admits of uniform treatment throughout the country. Therefore it is not a matter of a purely internal nature, and the silence of Congress upon the subject amounts to a declaration that such importation shall be free. Gray, Harlan, and Brewer, JJ., dissenting. *Leisy v. Hardin*, 10 Sup. Ct. Rep. 681. See *Lyng v. Michigan*, 10 Sup. Ct. Rep. 725, accord.

CONSTITUTIONAL LAW — POWER OF CONGRESS OVER THE TERRITORIES. — An act of Congress declared void the charter of the Church of Jesus Christ of Latter-Day Saints which had been granted by the Legislature of Utah. *Held*, that this was a valid exercise of the supreme legislative power which Congress possesses over the Territories of the United States. Upon the dissolution of this religious corporation, its personal property became vested in the government of the United States, to be applied under the doctrine of *cy pres* to some kindred object. Fuller, C. J., and Field and Lamar, JJ., dissenting. *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 10 Sup. Ct. Rep. 792.

CONTRACTS — FRAUD — PURCHASER FOR VALUE. — An individual obtained, by bribing members of the city council, a contract to furnish the city with hydrants. His assignee in good faith and for value supplied the hydrants. *Held*, that the city could not repudiate its agreement as against such innocent purchaser. *Burlington Water Works Co. v. City of Burlington*, 23 Pac. Rep. 1068 (Kan.).

CONTRIBUTORY NEGLIGENCE — IMPUTABILITY OF PARENT'S NEGLIGENCE TO CHILD. — The negligence of a parent cannot be imputed to a child, so as to bar an action by the latter for the wrongful act of another. *Chicago City Ry. Co. v. Wilcox*, 24 N. E. Rep. 419 (Ill.).

Illinois has generally been counted as following the so-called "New York rule" of *Hartfield v. Roper* upon the subject. See 1 Shearman & Redfield on Negligence, 4th ed., § 74, note 6. The court, in now adopting the "Vermont rule," of non-imputability (*Robinson v. Cone*, 22 Vt. 213), professes to correct those authors, and to distinguish the cases cited by them as follows: "In these cases the action was by an administrator for the benefit of the parents as next of kin. These cases are so clearly distinguishable from those in which the child himself sues, that they must have been cited by mistake." This same court, in *Holton v. Daly*, 106 Ill. 131, 1882, declared that this statutory action by the administrator for the benefit of the next of kin was simply a continuation of the right of action which would have accrued to the deceased himself had he survived the injury. To reconcile these decisions, and bring the cases attempted to be distinguished under the rule which forbids an action by the negligent parent for loss of service, it would seem that it ought to appear affirmatively that in the cases in question the negligent parents were the only next of kin to be benefited by the action. So far from this being the case, in some of them the negligent parent was killed in the same accident as the child. Considering, however, that in the large majority of cases the parents will reap the entire benefit, the distinction here laid down may not, as a piece of *rusticum judicium*, be so very objectionable.

EQUITY JURISDICTION — NUISANCE — ELECTRIC RAILWAYS. — In the present state of electrical science, a telephone company cannot enjoin the operation of an

electric railway on account of the serious injury to their business caused by the escape of electricity from its rails. *Cumberland Telephone Co. v. United Electric R. Co.*, 42 Fed. Rep. 273.

INSOLVENCY — AFTER-ACQUIRED PROPERTY. — Transactions of an undischarged bankrupt in respect to after-acquired property with a person acting *bona fide* and for value, whether with or without knowledge of the bankruptcy, are valid against the trustee until he intervenes. *Cohen v. Mitchell*, 25 Q. B. Div. 262 (Eng.).

INSOLVENCY — RIGHTS OF CREDITORS. — A creditor of an insolvent estate can prove and receive a dividend on the full amount of his debt irrespective of any collateral securities he may hold. *In re Lion Nat. Bank*, 24 N. E. Rep. 793 (N. Y.). See also *In re Souther*, 2 Lowell, 320, and 1 Ames, Cases on Bills and Notes, 880, note.

INSURANCE — RIGHT OF BENEFICIARY IN SUBSTITUTED POLICY. — A wife named as beneficiary in an insurance policy acquires a right therein which cannot be defeated by a surrender thereof and substitution of a new policy without her consent. *Putnam v. New York Life Ins. Co.*, 7 So. Rep. 602 (La.).

PROPERTY — CONFUSION — INTENTION OF TORTIOUS TAKER. — Where the defendant tortiously mixes his goods with those of the plaintiff so that they cannot be distinguished and each owner given his identical property, the goods being of unequal value, the plaintiff will not be entitled to the whole mixture unless the defendant acted fraudulently, wilfully, or with some improper motive or purpose. *Clafin v. Continental Jersey Works*, 11 S. E. Rep. 721 (Ga.).

PROPERTY — GIFT INTER VIVOS. — A gift *inter vivos* is not complete without delivery. *Cochrane v. Moore*, 25 Q. B. Div. 57 (Eng.). This case follows *Irons v. Smallpiece*, 2 B. & Ald. 551, lately so often doubted.

QUASI CONTRACTS — WAIVER OF TORT — ELECTION OF REMEDIES. — Three persons were concerned in the conversion of the plaintiff's goods. He brought an action for goods sold and delivered, and recovered judgment against two of them, and then brought this action for conversion against the third. Held, that by beginning an action for goods sold, the plaintiffs passed the title to the property. They gave up to the wrong-doers all their interest in the specific goods and relied on their right to payment. Therefore the defendant can defeat this action for conversion by showing the former judgment, although he was not a party to it; for the passing of the title is absolute, and any one can show it. *Terry v. Munger*, 24 N. E. Rep. 272 (N. Y.).

REAL PROPERTY — DEDICATION — RIGHTS OF REVERTER IN BURYING-GROUND. — The donor of land dedicated to a city for a grave-yard has a right of reverter therein upon abandonment for this purpose, and use as a public park. The doctrine of *cy pres* is inapplicable to such a case. *Campbell et al. v. City of Kansas*, 13 S. W. Rep. 897 (Mo.).

REAL PROPERTY — ESTOPPEL IN PAIS. — Where A., the owner of a strip of land along the highway, stood by in silence knowing that B. was making valuable improvements on his adjoining tract, which improvements could not be enjoyed without the strip of A.'s land, and knowing that B. was acting in the erroneous belief that such strip was his, held, that A. was estopped to set up his title, and would be perpetually enjoined. *Sumner v. Seaton*, 19 Atl. Rep. 884 (N. J.).

REAL PROPERTY — FORCIBLE ENTRY. — The owner of land making a forcible entry upon his own land, the land being in the actual possession of another who is not a recent trespasser or intruder, will be liable to the latter for the entry in an action of trespass, *g. c. f.* *Mosseller v. Deaver*, 11 S. E. Rep. 529 (N. C.).

REAL PROPERTY — INCREASE OF EASEMENT — CONSTITUTIONAL LAW — TAKING OF PROPERTY. — Where the fee of a highway is in the original owner of the soil, the public having acquired a right of way only, a telegraph company has no right to use the highway for erecting and maintaining a telegraph line without compensating the owner of the fee, although authorized to do so by statute,—such statute being unconstitutional. *Western Union Tel. Co. v. Williams*, 11 S. E. Rep. 106 (Va.).

See *Pierce v. Drew*, 136 Mass. 75, and *Julia Building Ass. v. Bell Tel. Co.*, 88 Mo. 258, *contra*.

REAL PROPERTY—WAY OF NECESSITY.—The defendant had a right of way of necessity over the plaintiff's land to a highway. The highway was subsequently discontinued. *Held*, that the defendant had no right to pass over a part of the discontinued highway belonging to the plaintiff in order to reach another highway, even although there was no other way to get out of his land. *Morse v. Benson*, 24 N. E. Rep. 675 (Mass.).

RES ADJUDICATA—FOREIGN JUDGMENTS.—The defendants obtained a judgment against the plaintiffs in France, and brought an action on the judgment here. The plaintiffs brought a bill for discovery in aid of their defence, and the defendants in a plea set up the French judgment. *Held*, that a judgment rendered in a court of a civilized country having jurisdiction of the subject-matter in an action in which the defendant, a citizen of the United States, appeared and defended, cannot be impeached when sued on here, though the defendant was denied the benefit of our rules of evidence and procedure, and though the judgment was based on false testimony and was erroneous. *Hilton v. Guyott*, 42 Fed. Rep. 249. See also *McMullen v. Richie*, 41 Fed. Rep. 502.

SALE—RESCISSON OF CONTRACT—FRAUDULENT REPRESENTATION TO MERCANTILE AGENCY.—A party selling goods to an insolvent firm on the strength of a false representation by such firm to a mercantile agency as to its financial condition, may rescind the sale and recover the goods. *Gainesville Nat. Bank et al. v. Bamberger et al.*, 13 S. W. Rep. 959 (Tex.).

STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.—A promise to support a child fifteen years old until he becomes of age, is not an agreement "not to be performed within a year" within the meaning of the Statute of Frauds, since such promise might be fully performed within a year if the child should die within that time. *Woolbridge v. Stern*, 42 Fed. Rep. 311.

STATUTES—EXAMINATION OF JOURNALS.—Although an apparent statute has the signatures of the presiding officers of the House and Senate, and of the Governor, the courts will declare it void if they find from an examination of the journals of the Houses that it never in fact passed the Legislature. *Rode v. Phelps*, 45 N. W. Rep. 493 (Mich.).

TELEGRAPH—DELIVERY OF TELEGRAM.—A message was delivered to a telegraph company, addressed to "A. B., care of C. D., Fort Scott, Kansas." The latter refused to receive the telegram. *Held*, that an instruction to the effect that if C. D. gave the company's messenger such instructions as would enable him with ordinary diligence to find the addressee, then it devolved upon the company to deliver the message as instructed was erroneous, as imposing too great a duty upon the telegraph company. *Western Union Tel. Co. v. Young*, 13 S. W. Rep. 985 (Tex.). In *Pope v. W. U. Tel. Co.*, 9 Brad. (Ill. App.), an instruction that the company was bound only to deliver the telegram at the office address given, was held erroneous, as being too great a limitation on the duty of the company. See also *Gray, Communication by Telegraph*, § 23.

TORT—DEATH BY WRONGFUL ACT—ACTIONS.—Where statutes provide for the survival of certain delictual actions to the executor or administrator of the deceased, and also give an action to the personal representative for the benefit of the widow or next of kin, the personal representative may recover substantial damages in two actions, one under each statute. *Davis v. St. Louis, I. M., & S. Ry. Co.*, 13 S. W. Rep. 801 (Ark.). This case follows *Needham v. Ry. Co.*, 38 Vt. 294. For a discussion of cases reaching contrary results in Maine, Illinois, and Kansas, see 28 Am. L. Reg. 385, § 13.

REVIEWS.

HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY. By A. H. Marsh, Q. C. Toronto; Carswell & Co., 1890. 8vo. Pages 140.

The author is the Equity Lecturer to the Law School in connection with the Law Society of Upper Canada, and to this fact this book owes its existence. It is written in a lively and forcible style, and

describes very clearly and concisely the origin of the Court of Chancery and the general course of its development. As the book is purely introductory, no attempt is made to mark out the extent of the jurisdiction of the court. For this reason it is well adapted for circulation outside the ranks of the legal profession. It is not expected, of course, that the book will aid the lawyer in his practice, but the author hopes that it may be of use to such as desire to refresh their memories as to the matters touched upon.

G. C.

THE PATENTEE'S MANUAL. By James Johnson and J. Henry Johnson. New York: Longmans, Green, & Co. Sixth edition, 1890. 8vo. Pages xxxii and 534.

This edition of a book already well and favorably known in its special field brings down to date all the provisions, legislative and judicial, governing the law and practice of patents for inventions in Great Britain. In the case of a book which has run through so many editions as this, extended criticism is uncalled for. In brief, it may be said that the book combines in an admirable manner the practical and theoretical aspects of the subject, each being readily separable from the other, for the purposes of examination of special topics, by means of the copious and well-arranged index. The wish of the authors that the book may prove of value, not only to inventors and patentees, but to the legal profession at large, seems abundantly realized—indeed, one of the chief merits of the book would seem to be its ready adaptability to the needs of the lawyer suddenly called to advise upon the patentability of an invention.

Among the more important of the numerous and valuable appendices are those containing the English legislation touching the subject of Patents, from the old Statute of Monopolies down to the present time, the International Convention and Protocol for the Protection of Industrial Property, the Patent Rules of 1890, and a careful Digest of the Patent Laws of Foreign Countries and the British Colonies. W. B.

BOOKS RECEIVED.

JURISDICTION; ITS EXERCISE IN COMMENCING AN ACTION AT LAW. By Joseph H. Vance. Ann Arbor: Argus Book and Job Rooms, 1890. Pages xxi and 63.

AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY. By D. M. Kerly, M.A., LL.B. Cambridge, England: at the University Press, 1890. 8vo. Pages 303.

THE DOCTRINE OF EQUITY. By John Adams. Eighth edition, by Robert Ralston. Philadelphia: T. & J. W. Johnson & Co., 1890. 8vo. Pages lxix and 839.

THE TRIAL OF JESUS FROM A LAWYER'S VIEW. By C. H. Blackburn. Cincinnati: Robert Clark & Co., 1890. 8vo. Pages 68.

THE RIGHTS OF MINORITY STOCKHOLDERS, and What Legislation, if Any, is Needed for their Protection. By Eugene D. Hawkins. Albany: Weed, Parsons & Co., 1890. Pages 210.

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“LAW AND FACT” IN JURY TRIALS.

THE discrimination of law and fact, in its relation to jury trials, is often identified by practitioners, judges, and law-writers, with the question of what matter is for the court and what for the jury. This contains an important intimation, namely, that the notion of “law and fact,” when thus spoken of, is limited to the issue; for juries have nothing to do with anything but the issue; of this more will be said later on. But if we ask the question what sort of thing it is that is for the court and what for the jury, we do not get on, for we are told that matters of law are for the court, and matters of fact for the jury,—*ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores*. We do not, then, escape the necessity of trying to determine what is matter of fact and what matter of law.

I. In endeavoring to help answer that question let us ask what it is that juries, inquests, assizes, were created for. We shall find the answer in the old precept to the viscount for summoning them, and in their oath. The viscount was to summon those “who best can and will” *veritatem dicere*. The jurors in the assize of novel disseisin swore, one after another, as Bracton gives it in his Latin:¹ “*Hoc auditis, justitiarii, quod veritatem dicam. . . . de tenemento de quo visum feci;*” and their verdict was this promised *veritatis dictum*. They were wanted, in a pending legal controversy, where

¹ Fol. 185.

the parties were at issue on some question of fact, to say what the fact was, and the name for this thing was "rei veritas." The truth of the thing about what? About all sorts of questions. Was a party in possession of something? Did he disseise somebody? Had he put his seal to a paper? Did he enfeoff another of land? and what land? What is the *consuetudo*, the custom, of such a place? Is a person legitimate, or a *nativus*, or an idiot, or insane? This is the same sort of question that juries pass on to-day,—having the same elements of opinion and law, compounded with the simpler features which catch the eye and ear; questions of fact, as we say.

Now, although juries had only to do with an issue, yet questions of fact were by no means limited to the issue. The courts settled a great many questions of fact for themselves; they could not take a step without passing upon such questions. Was the deed that was put forward in pleading "rased" or not? If a party claimed the right to defend himself as a maimed person, was it really mayhem? Was a person presenting himself and claiming to be a minor, really under age? A stream of questions as to the reality, the *rei veritas*, the fact, of what was alleged before them, was constantly pouring in. A prisoner, for example, had confessed; on being brought into court, he declared that it was by duress of his jailer. Was this so? To find this out the justice took the short cut of sending for several of the fellow-prisoners and the jailer, and questioning them all in the prisoner's presence; and he found that it was not true.¹ This, again, is just as it is to-day. Courts pass upon a vast number of questions of fact that do not get into the pleadings. Courts existed before juries; juries came in to perform only their own one special office, and the courts have continued to retain a multitude of functions which they exercised before, in ascertaining whether disputed things be true. In other words, there is not and never was any such thing as an allotting of all questions of fact to the jury. The jury simply decide some questions of fact. The maxim *ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores*, was never true, if taken absolutely.² It was a favorite with Coke in discussing special

¹ Y. B. 30 and 31 Edw. I. 543 (*circa* A.D. 1300). "Ecce," says the justice, "socii vestri in prona testificantur coram vobis. . . . Vis tu aliud aliquid dicere?"

² This "decantatum," as Vaughan called it, in his famous opinion in *Bushell's Case*

verdicts, and in *Isaack v. Clark*¹ he attributes it to Bracton; but that appears to be an error; at any rate, a careful search for it in Bracton has failed to discover it. It seems likely that Biener is right when he intimates that this formula took shape in England in the sixteenth century.² But the maxim was never meant to be taken absolutely. It is, as I said, limited to questions with which the jury has to do; it relates to *issues* of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial; and so of many of those which present themselves during the trial. Apart from "evidence," to which the maxim has no reference, the jury has to do with only a limited class of questions of fact, namely, questions of ultimate fact; it is only to these that the maxim applies.³

If, then, we limit the inquiry to the issue, in what sense is it true? (1.) As stating the great, general rule that the regular common-law mode of trying questions of fact is by jury; e.g., it is accurately said by Coke:⁴ "The most usual trial of matters of fact is by twelve such men; for ad quæstionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for ad quæstionem juris non respondent juratores." (2.) In a sense that emphasizes the limitations of the jury,—as saying that it is *only* fact which they are to decide, "Non est juratoribus judicare," was the judgment of the court in 1554, when an inquest

(*Vaughan*, 135), appears in a variety of forms; a common one is that in the text. Bulstrode (ii. 204 and 305) makes Coke say *jurisperitus* (and so Rolle, i. 132) and *jurisprudentes*, instead of judges.

¹ 1 Rolle, p. 132; s. c. 2 Bulst. p. 314 (1613-14).

² Biener, Eng. Geschw. i. ch. 2, sect. 25; ch. 5, sect. 40. For this reference I am indebted to my friend, Mr. Fletcher Ladd. Best (Ev. sect. 82, note) seems to be in error when he understands Bonnier (*Preuves*, 4th ed., i. sect. 119) to say that the maxim "has been long known on the Continent." Bonnier, in discussing the question whether the judge is bound by the answers of experts, does indeed refer to "le vieil adage mal à propos repondut per certains auters modernes, ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices;" but this writer was familiar with the phrases of our legal literature, and the absence of any reference to the maxim in other continental authors to which I have had any reference or access, leads me to think that Bonnier was merely quoting *le vieil adage* from our law. Coke seems to have spawned Latin maxims freely. Is this also his? and so his reference to Bracton merely to an authority for the *doctrine*, and not the phrase? In those days of polyglot law it was easy for a man to slip back and forth between his English and his Latin and law French. "*Come Bracton est*," is the expression that Rolle puts into his mouth. Bulstrode merely has it, "As Bracton."

³ Bartlett *v. Smith*, 11 M. & W. 483; Bennison *v. Jewison*, 12 Jurist, 485; s. c. I Ames, Bills and Notes, 512.

⁴ Co. Lit. 155 b.

of office had found a conclusion of law;¹ or as the counsel expressed it in another report of the case:² "For the office of twelve men is . . . not to adjudge what the law is, for that is the office of the court, and not of the jury." (3.) In a sense which emphasizes the right of the jury to find a special verdict in any case, and to take the opinion of the judges on the law as arising out of the facts thus returned. "It was resolved by Sir Ed. Anderson, chief-justice, and all the justices of the bench, that the special verdict . . . was well founded; they held, that in all pleas . . . and upon all issues joined . . . the jury may find the special matter . . . [and] pray the opinion of the court . . . by the common law, which has ordained that matters in fact shall be tried by jurors, and matters in law by the judges; and as ad quæstionem," etc.³

It is true that Coke had also a balanced way of quoting the maxim, as if it represented a limitation upon the judges as wide and general as that upon the jury. But although it became thus a loose flourish and ornament in his pedantic speech, yet its true significance may be drawn out thus: In general, issues of fact, and only issues of fact, are to be tried by jury; when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgment upon these. That this determination by the jury involves a process of reasoning, of inference and judgment, makes no difference; for it is the office of jurors "to *adjudge upon their evidence* concerning matter of fact, and thereupon to give their verdict, and not to leave matter of evidence to the court to adjudge which does not belong to them."⁴

II. Let us now try to find some definition of "fact," and a just discrimination between fact and law. To define fact is, indeed, a "perylous chose," as they say in the Year Books; and some per-

¹ Dyer (ed. 1601), 106 *b*; and see Hill *v.* Hanks, 2 Bulst. p. 204 (1614); Isaack *v.* Clark, ib. p. 314 (1614-15); King *v.* Poole, Cas. t. Hardwicke, p. 28 (1734).

² Plowden, p. 114.

³ Dowman's Case, 9 Co. pp. 12-13 (1586).

⁴ Littleton's Case (1612), cited in 10 Co. p. 56 *b*.

sons think it unnecessary.¹ It is certainly true that the term is widely used in the courts, much as it is used in popular speech; that is to say, in a tentative, literary, inexact way; and there are those who would let all such words alone and not bother about precision. But as our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation and research that clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know just how they are used.

I. "Fact" and its other forms, *factum*, *fait*, stand in our law books for various things, *e.g.*, (a) for *an act*; just as the word fact does in our older general literature. "Surely," says Sir Thomas Browne,² "that religion which excuseth the fact of Noah, in the aged surprisal of six hundred years," etc.; and so Bracton:³ "Since he is not the agent of the one who made him essoiner, it is not for him to prove another's status or another's act" (*factum*). (b) For that completed and operative transaction which is brought about by sealing and executing a certain sort of writing; and so for the instrument itself, the *deed* (*factum*). (c) As designating what exists, in contrast with what should rightfully exist, — *de facto* as contrasted with *de jure*. (d) And so, generally, as indicating things, events, actions, conditions, as happening, existing, really taking place. This last is the notion that concerns us now. It is what Locke expresses⁴ when he speaks of "some particular existence, or, as it is usually termed, matter of fact." The

¹ For instance, a very able writer in the *Solicitors' Journal* (vol. 20, 869). "A definition," he remarks, "is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition, therefore, is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it. And where it is unnecessary to define it is also dangerous, because an incorrect definition will confound the correct use," etc. That is a true utterance of the inherited instinct of English-speaking lawyers and judges. But it is quite certain that as our law grows it must be subjected more and more to the scrutiny of the legal scholar, and that it will profit by any serious and competent effort to clarify and restate it.

² *Pseudodoxia Epidemica*, Book v. ch. xxiii. sect. 16; on the Vulgar Error that "it is good to be drunk once a month."

³ Fol. 337.

⁴ *Human Understanding*, Bk. iv. chap. 16, sect. 5.

fundamental conception is that of a thing as existing, or being true. It is not limited to what is tangible, or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, propositions, when conceived of as existing or being true, are conceived of as facts. The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All inquiries into the truth, the reality, the actuality of things are inquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something, of the *rei veritas*.¹ But this, it may be said, is a portentous sort of definition; it is turning every question into a question of fact. That is true, so far as any question asks about the existence, the reality, the truth of something. But of course in actual use the term has other limitations. In the sense now under discussion, as we have noticed, "fact" is confined to that sort of fact, ultimate fact, which is the subject of the issue. Moreover, that kind of fact which we call "law" is discriminated, and set apart under its own name.

¹ Bentham, who is not very instructive here, defines thus: "By a fact is meant the existence of a portion of matter, inanimate or animate, either in a state of motion or in a state of rest." But he divides facts into (1) physical and psychological; (2) events and states of things; (3) positive and negative; adding that "the only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more." (Works, vi. 217-218.) And so Best, Ev. §§ 12, 13. Holland (Jurisprudence, 3d ed. 88) simply says: "'Facts' (Thatsachen, Faits), which have been inadequately defined as 'transient causes of sensation,' are either 'Events' or 'Acts.'" Sir Wm. Markby (Law Mag. and Review, 4th Series, ii. at p. 312), in a neat and valuable discussion of "Law and Fact," after remarking that he would rather not pledge himself to any final definition of what a fact is, adopts for his immediate purpose Stephen's definition in the first two editions of his Digest of Evidence, art. I, viz.: "Fact means (1) everything capable of being perceived by the senses, (2) every mental condition of which any person is conscious." But Stephen afterwards withdrew this definition. He had been keenly criticised by a writer in the Solicitors' Journal (vol. 20, 869, 870; Sept. 9, 1876), who said, "The proper subject of affirmation and negation is not 'facts,' but propositions;" and, among other valuable remarks, inquired how it was with such matters as negligence, custom, ownership, the defamatory quality of a writing, and the qualities of persons and things generally. "The phraseology," he added, "is really applicable only to the rudest form of jurisprudence." The writer thought that no definition is necessary. These criticisms took effect; in his third edition (and so ever since) Stephen dropped any attempt at definition, and substituted in art. I, this: "'Fact' includes the fact that any mental condition of which any person is conscious exists;" and in his preface to the third edition, after remarking that he "had been led to modify the definition of fact by an acute remark made on this subject in the Solicitors' Journal," he added that "The real object of the definition was to show that I used the word 'fact' so as to include states of mind." See the learned consideration whether a thing be *quid facti* or *quid juris*, in Menochius, De Præsumptionibus, Lib. I, qu. II.

2. What, then, do we mean by *law*? We mean, at all events, a rule or standard which it is the duty of a judicial tribunal to apply and enforce. It is not my present purpose to say anything as to the exact nature or origin of law.¹ How the rule or standard comes into existence, where it is found, just what the nature of it is, how far it is the command of a supreme political power, and how far the silently-followed habit of the community, and other like questions,—there is no occasion to consider now. It is enough to mark one characteristic of it, and to say, that in the sense now under consideration, nothing is law that is not a rule or standard which it is the duty of judicial tribunals to apply and enforce. I do not even care to say that all general standards that courts apply are to be called law; that matter I pass by.² But this is true, and it is enough for our present purpose, that, unless there be a question as to a rule or standard which it is the duty of a judicial tribunal to apply, there is no question of law. The inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly to be classed together; and these are questions of law.

III. But we must discriminate further. Besides questions of fact and law, there are questions of method, of procedure. "It is the office of jurors to adjudge upon their evidence," so the court is reported to have said in Littleton's Case.³ That remark brings out a fundamental point; viz., that it is no test of a question of fact that it should be ascertainable without reasoning and the use of the "adjudging" faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only this way. Of course this function of reasoning was constantly exer-

¹ See Mr. James C. Carter's recent address before the American Bar Association, entitled "The Ideal and the Actual in Law;" and compare Holmes, Common Law, 35-38, 150-1; Markby, Elements of Law, ch. 1, sects. 1-31. Holland, Elements of Jurisprudence, c. ii. and c. iii. "A law," says Holland (3d ed., p. 36), "in the proper sense of the term, is therefore a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society." Compare, also, Maine's Ancient Law, cc. 1 and 2; Lord Esher, M.R., in *Cochrane v. Moore*, 25 Q. B. D. 57.

² Markby, *ubi supra*; *infra*, p. 167. If a jury cannot, in point of reason, find a verdict, they cannot as a matter of law; and such questions go up on exceptions, *Denny v. Williams*, 5 Allen, 1.

³ *Ante*, p. 150.

cised by the judges; the remark just quoted makes it apparent that it must also be exercised by juries. This sort of "evidence of things unseen" is common to both. We are not, then, to suppose that a jury has found all the facts merely because they have found all that is needed as a basis for the operation of the reasoning faculty; for as regards reasoning the judges have no exclusive office; the jury also must reason at every step.

There comes up for consideration, then, this matter of reasoning: a thing which intervenes, in questions of negligence and the like, between the primary facts, or what may be called the raw material of the case, and the secondary or ultimate facts.¹ Just as both court and jury must take notice, without proof, of much that is assumed as known to all concerned in judicial inquiries, so each must conduct processes of reasoning in accomplishing the ends of its own department. It is true that the jury was not brought into existence because the court needed help in this business, but simply to report upon the *rei veritas*; reasoning, however, was unavoidable. Courts might always have done that for themselves if they could have been furnished with a full supply of fact; but that was impracticable, and at no period of their history could juries discharge their own special function of ascertaining and reporting facts, without going through a process of reasoning. "While the juror's oath," says Bracton,² "has in it three *comrades* (*comites*), truth, justice, and judgment; truth is to be found in the juror, *justitia et judicium* in the judge; but sometimes it seems that judgment belongs to jurors, since they are to say on their oath, yet according to their belief, whether so and so disseised so and so or not." And again,³ "If the jurors state the fact as it is (*factum narraverint sicut veritas se habuerit*), and afterwards judge the fact according to their statement of it and err, they make a mistaken judgment rather than a false one, since they believe that such a judgment follows such a fact." Bracton uses the expression "they judge the fact." We can observe the real nature of this operation by looking at the case of

¹ It would be straining our word "procedure" beyond due limits to say that reasoning is part of the procedure, for reasoning is essential everywhere in the law; yet one may get a useful hint by regarding it, for a moment, in that aspect. As the procedure and method of trial are to be discriminated from both law and fact, the subject-matter that is to be dealt with in these ways and methods, — so we may separate from law and fact the process by which conclusions are reached; viz., the process of reasoning.

² Fol. 186, 6.

³ Fol. 290, 6.

expert witnesses to fact. What is their function? It is just this, of judging facts. They are called in because they are men of skill and can interpret phenomena which other men cannot, or cannot safely interpret. They judge the phenomena, the appearances, or facts which are presented to them, and testify to that which in truth these signify or really are; or they estimate qualities and values. We say that they testify to opinion. In truth, they are judging something, and testifying to their judgment of fact. It is perfectly well settled in our law that such opinions or judgments are merely those of a witness, they are to aid the jury or the judge of fact, and not to bind them; the final judgment is for the jury,¹ and, unquestionably, the judgment is one of fact. This is clearly expressed in Germany, where the expert appears to have the final authority which we allow only to the jury: "Experts judge only as to the relation of phenomena perceived by the senses to general rules of their art or science, but not at all as to the relation of a fact to legal truths (*Rechtswahrheiten*); that is merely the judge's affair. . . . In contrast with his judgment, what the expert decides is simply a fact, no more nor less than a mere witness's declaration, and this fact, like every other, the judge has to refer to the appropriate rule of law. For this reason experts are called *judices facti*, — *judices* as opposed to ordinary witnesses, *judices facti*, because they do not judge as to the law, but their judgment or opinion only gives as its result a fact."² The nature of the operation and the true character of the result are evidently just the same, whether it be the judgment of the witness or of the jury that is final. It is in either case a judgment of fact.

We have thus noticed a *tertium quid*, the process of reasoning, which we have set aside as relating to method. A further thing was brought to notice in the passage from Littleton's Case,³ viz., "matter of evidence." The jury, it was there said, "are not [by a special verdict] to leave matter of evidence to the court to adjudge;" they are themselves "to adjudge upon that evidence concerning matter of fact."

¹ Head *v. Hargrave*, 105 U. S. 45; 3 Harv. Law Rev. 301-2; and so in modern times in France; Bonnier, *Preuves*, 4th ed. sect. 119.

² Dr. W. H. Puchta in *Zeitschrift für Civilrecht und Prozess*, iii. 57. Compare *Das Archiv. für die Civilistische Praxis*, xxvi. 255-6. For these references I am indebted to my friend, Mr. Fletcher Ladd. See also Bonnier, *Preuves*, *ubi supra*.

³ *Ante*, p. 150.

Now, "matter of evidence" is here discriminated from "matter of fact." It is not, of course, to be classed with "matter of law," and it is not matter of fact in the sense which we now fix upon that phrase. What then is it? It is something incidental, subsidiary, belonging where the matter of reasoning belongs, being, indeed, only so much material offered as the basis for inference to "matter of fact." When it is said that fact is for the jury, the fact intended, as we have seen, is that which is in issue, the ultimate fact, that to which the law annexes consequences, that thing which, in a special verdict, the jury must plainly find, and not leave to the court to find. Issues are not taken upon evidential matter. Of evidence, the same thing is to be said which we have already said of the reasoning that is founded upon it; namely, that it is for both court and jury, according as either has occasion to resort to it.

I have spoken of evidence and reasoning as belonging to the region which has to do with methods of arriving at the law and fact that are involved in an issue. In expressing this I have said, with what may seem a certain violence of phrase, that they belonged, in a way, with procedure. It will be useful to indicate here, a little more plainly, just what is meant by this. Reasoning, the rational method of settling disputed questions, is the modern substitute for certain formal and mechanical "trials" (*i.e.* tests) which flourished among our ancestors for centuries, and in the midst of which the trial by jury emerged. When two men to-day settle which is the "best man" by a prize-fight, we get an accurate notion of the old Germanic "trial." Who is it that "tries" the question? The men themselves. There are referees and rules of the game, but no determination of the dispute on grounds of reason,—by the rational method. So it was with "trial by battle" in our old law; the issue of right, in a writ of right, including all elements of law and fact, was "tried" by this physical struggle, and the judges of the Common Pleas sat, like the referee at a prize-fight, simply to administer the procedure, the rules of the game. So of the King's Bench in criminal appeals; and so sat Richard II. at the "trial" of the appeal of treason between Bolingbroke and Norfolk, as Shakespeare represents it in the play. So of the various ordeals; the accused party "tried" his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath; the question,

both law and fact, was "tried" merely by the oath, with or without fellow-swearers. The old "trial by witnesses" was a testing of the question in like manner by their mere oath. So a record was said to "try" itself. And so when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that "tried" the case. How this mode of trial came to swallow up the others, and then to lose some of its chief features, and become shaped into an instrument of our modern purely rational procedure, is a long story, and is not for this place. But as we use the phrase "trial" and "trial by jury" now, we mean a rational ascertainment of facts, and a rational ascertainment and application of rules. What was formerly "tried" by the method of force or the mechanical conformity to form, is now "tried" by the method of reason.

The long survival in our system of certain ancient forms and phrases, presently to be mentioned, makes it interesting to notice that in the older days the word "law" (*lex*) often indicated, not the substantive law, but a mode of trial. This comes out clearly in an exposition of the phrases *lex et consuetudo* in the old custumal of Normandy,¹ where we read: "*Consuetudines* are customs practised from ancient times, allowed by rulers and kept up by the people, determining whose anything is or to what it belongs. But *Leges* are what is instituted by rulers and kept up by the people in the country, for settling particular controversies. *Leges* are, so to speak, the rightful instrumentality for declaring the truth of a controversy. And there are certain modes of practising the *leges* (*usus*). To illustrate: the *consuetudo* is, that a widow has the third part of the fief that her husband possessed at the time of the marriage. But if a controversy arises as to whether he did then

¹ L'Ancienne Coutume de Normandie (compiled A.D. 1270-1275) c. xi. *De Consuetudine*: "Consuetudines vero sunt mores ab antiquitate habiti, a principibus approbati, et a populo conservati, quid cuius sit vel ad quod pertinet limitantes. Leges autem sunt institutiones a principibus factae et a populo in provincia conservatae, per quas contentiones singulæ deciduntur. Sunt enim leges quasi instrumenta in jure ad contentionum declarationem veritatis. Usus autem circa leges attendunt; sunt enim usus modi quibus legibus uti debemus. Verbi gratia: consuetudo est quod relictæ habeat tertiam partem, feodi quod vir sibi tempore contractus matrimonii possidebat. Si autem contentio oriatur de aliquo feodo quod tunc ille non possidebat, ipsa tamen in eodem dotem reclamante, per legem inquisitionis et hujusmodi contentio habet terminari. Usus autem sunt modi quibus hujusmodi lex habet fieri; Videlicet, per duodecim juratos et non suspectos, et feodo prius viso." Cited in Brunner, Schwur. 177. See, also, Stephen, Pleading, note 36.

possess a certain fief, in which she claims dower, it is to be settled *per legem inquisitionis*, and the like. And the methods (*usus*) are the ways in which such a *lex* is to be performed, namely, by twelve persons, under oath, worthy of credit, who have inspected the fief."

Readers of Sir Henry Maine will recall the emphasis which he puts upon the prominence of procedure in early systems of law. The Salic law, he tells us, "deals with thefts and assaults, with cattle, with swine, and with bees, and, above all, with the solemn and intricate procedure which every man must follow who would punish a wrong or enforce a right." And again: "So great is the ascendancy of the Law of Actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms."¹ Our inherited law has kept in existence until a period within living memory a phrase which comes straight down from those early days. Until the year 1833² certain cases in England could be tried *per legem*; a man waged his law (*vadiare legem*), *i.e.* gave pledges for performing it; and afterwards performed his law (*facere legem*). In the system from which ours came, there were formerly many of these *leges*, or means of trial. Trial by battle was the *lex ultrata*; by the ordeal, the *lex apparens*, *manifesta*, or *paribilis*; by the single oath, the *lex simplex*; by the oath with compurgators, the *lex probabilis*, or the *lex disrassinae*; by record, the *lex recordationis*; by inquest, or the assize, *lex inquisitionis* and *recognitionis*.³ Our phrase "law of the land" comes down out of the midst of all this; in the Germanic law it was one of the ways of defending one's self, *per legem terre*; "by *lex terre* is meant," says Brunner,⁴ "the procedure of the old popular law." This old use of the term "law," so different from ours, is to be explained by the considerations mentioned in the last ten pages of Sir Henry Maine's "Early Law," from which I have already quoted. All the primitive codes, he says, "seem to begin with judicature, and to distribute substantive law into 'heads of dispute.'" "The authority of the Court of Justice overshadowed all other ideas and considerations in the minds of those early code-

¹ Early Law and Custom, 168, 389.

² Stat. 3 and 4 Wm. IV. § 42, s. 13.

³ On this subject, see Brunner, Schwur. pp. 168 *et seq.*; Spelman, Gloss. *sub vee Lex*; Ducange, ib.

⁴ Schwur. 254.

makers." "It must have been a man of legal genius who first discerned that law might be thought of and set forth apart from the Courts of Justice which administered it, on the one hand, and apart from the classes of persons to whom they administered it, on the other."

Turning back, now, from these old conceptions to our own, we are to observe again that while, of course, there are rules and laws of procedure, and while, of course, these are to be ascertained by the judges, they are not what is meant (still less is meant a mode of trial), when we contrast the law and fact that are blended in the issue. There the conception is purely that of the substantive law which is applicable to the "facts," viz., the ultimate facts that are in question. And we are to remark again that equally the topics of evidence and of reasoning, which deal with the methods of our modern "trials," belong one side of our subject.

IV. We have made our definitions and principal discriminations.¹ But, as I said at the outset, the allotment of fact to the jury, even in the strict sense of fact, is not exact. The judges have always answered a multitude of questions of ultimate fact involved in the issue. It is true that this has often been disguised by calling them questions of law. In the elaborate and carefully prepared codification of the criminal law, which has been pending for the last eleven years in the British Parliament, we are told, of "attempts to commit offences," that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation . . . and too remote to constitute an attempt . . . is a question of law."² In a valuable letter of Chief-Judge Cockburn, addressed to the Attorney-General, and commenting on the Draft Code (dated June 12, 1879, and printed by order of the House of Commons), he very justly remarks upon this passage: "To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law. . . . The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge." The

¹ As regards what are called mixed questions of law and fact, see *infra*, p. 169.

² Report of Criminal Code Bill Commission, Draft Code, sect. 74.

same sort of thing which is thus objected to is very common in judicial language here.

Among these questions of fact decided by judges, the construction of writing is a conspicuous illustration. The reasons for leaving questions as to the meaning and construction of writing to the judges appear to be historical and administrative; they do not rest on the ground that these are questions of law, for, mainly, they are not.¹ They are not, as a class, decided by the application of legal rules, but by a critical reading of the document in the light of the circumstances attending the making of it. Some legal rules there are, for the interpretation of writings, but in a great degree this is a question of the intention of the writer, and so a question of fact.² Of course, any general statement about writings must be subject to qualification, for there is a great diversity of them. There are "records," judicial, legislative, executive, such as statutes, judgments, pleadings,—the proving, use, and application of which were the subject of legal rules before juries were born; these rules largely hold their place to-day for reasons of sense and convenience. In a great degree these matters are for the judges. There are written memorials of law, of which some at least, those of the domestic forum, belong to the judges. There are deeds, charters, and wills, operative instruments, which are the subjects of specific legal rules as to their constitution, form, and phraseology. There is negotiable paper, of which the like is true. There are contracts in writing or written memoranda required by law. There are writings not required by law, but made by the parties merely to be a memorial of a transaction. And there are other writings of a merely casual nature, like ordinary correspondence. Many writings used to be regarded as in themselves constituting, or rather furnishing, by the mere inspection of them, a mode of "trial," of what they reported,—as records did. If such a writing were once authenticated, it closed inquiry. Such writings, even records and statutes, might be merely evidential, as when a deed in a question of prescription went to the jury merely as evidence of ancient possession, and not to show when it began.³ But, whatever their character and how-

¹ But we all know the usual form of speech about it: "A pure question of law," say the court in *Hamilton v. Liv. Co.*, 136 U. S. p. 255.

² See Professor Markby's interesting article on "Law and Fact," Law Mag. and Rev. (4th series) ii. 313; *Edes v. Boardman*, 58 N. H. p. 592.

³ Y. B. 34 H. VI fol. 36, pl. 7 (1456).

ever used, the construction of writings, when once the facts necessary for fixing it were known, was a matter for the courts. This has always been so; perhaps a reason for it may be that as writings came into general use and so got into our courts, mainly through the Roman ecclesiastics,¹ so the Roman methods of dealing with them were naturally adopted; and, once adopted, were not changed when new modes of trial, such as the trial by jury, came in. And, to be sure, the jury could not read. It may be added that an established judicial usage like this has always been powerfully supported by considerations of good sense and expediency. Of a great part of the writings brought under judicial consideration, it is true that they were made, as Bracton says, to eke out the shortness of human life, "ad perpetuam memoriam, propter brevem hominum vitam." Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents.

It is on this ground of policy, or on like legislative considerations, and above all, for fear the jury should decide some question of law that was complicated with the fact,—that many other questions of fact have at one time or another been taken possession of by the judges. Whether there is malice in cases of murder, what is sufficient "cooling-time," in case of provocation,² and, in actions for malicious prosecution, whether the cause for instituting the prosecution were "reasonable and probable," are well-known illustrations of this. It was from like motives that courts refused to allow juries to find a general verdict in cases of criminal libel.³

How is it that the judges, sometimes with and sometimes without the coöperation of the parties, have worked all this out? In various ways: 1. Through their power of fixing the definition of legal terms. Such phrases as "malice," "false pretences," "fraud," "insanity," "reasonable notice," and the like, have required definition. The judges alone could give it; and they have sometimes given it as in the case of insanity, in a manner to close questions of fact which might well have been left open.⁴

¹ Anglo-Saxon Law, 230.

² R. v. Onbey, 2 Lord Raymond, p. 1494.

³ Com. v. Anthes, 5 Gray, 212-219.

⁴ See the acute observations of Mr. Justice Doe in dissenting opinions in State v.

Of these judicial definitions our books are full. Sometimes they begin by fixing an outside limit of what is rationally permissible, as in many of the cases about reasonable time and the like; and then grow more precise. In this way what is reasonable notice of the dishonor of a bill grew to be fixed. Juries were resisted by the court when they sought to require notice within an hour, and, on the other hand, to support it if given within fourteen days, or within three days, when "all the parties were within twenty minutes' walk of each other;"¹ and so the modern rule became established that ordinarily notice is sufficient if given on the following day. In the case of uncertain fines in copyholds, the courts had previously gone through a like process of regulating excess, until at last, not without the aid of courts of equity, they had fixed a specific outside limit.²

2. Very soon, as it seems, after the general practice began of allowing witnesses to testify to the jury, an interesting contrivance for eliminating the jury came into existence, the demurrer upon evidence. Such demurrs, like others, were demurrs in law; but they had the effect to withdraw from the jury all consideration of the facts, and, in their pure form, to submit to the court two questions, of which only the second was, in strictness, a question of law: (1) Whether a verdict for the party who gave the evidence *could* be given, as a matter of legitimate inference and interpretation from the evidence; (2) As a matter of law. Of this expedient, I do not observe any mention earlier than the year 1456, and it is interesting to notice that we do not trace the full use of witnesses to the jury much earlier than this. Near the end of the last century demurrs upon evidence were rendered useless in England, by the decision in the case of *Gibson v. Hunter* (carrying down with it another great case, that of *Lickbarrow v. Mason*, which, like the former, had come up to the Lords upon this sort of demurrer),³ that the party demurring must specify upon the record the facts which he admits.⁴ That the rule was a new one is fairly plain from

Pike, 49 N. H., pp. 436-442, and *Boardman v. Woodman*, 47 N. H. pp. 146-150; and the opinion of the court (Ladd, J.) in *State v. Jones*, 50 N. H. 369.

¹ *Tindal v. Brown*, 1 T. R. pp. 168-9.

² Per Lord Loughborough, *Doug.* 724, note.

³ *Gibson v. Hunter*, 2 H. Bl. 187; *Lickbarrow v. Mason*, ib. 211.

⁴ This is the rule laid down by *Eyre*, C. B., in his advisory opinion to the Lords, and it is taken to have been the ground of the judgment.

the case of *Cocksedge v. Fanshawe*,¹ ten years earlier. It was not always followed in this country, but the fact that it was really a novelty was sometimes not understood.²

In handling this keen-edged instrument, the demurrer to evidence, it is more than likely that the just line between the duties of court and jury was often overstepped by assuming that what the court thought the right inference was the only one allowable to the jury. Nothing is more common, even to-day, than the assumption that nothing but a question of law remains, when, in reality, the most important and even necessary inferences of fact are still to be drawn. In this way much which belongs to the jury passes over, unnoticed, into the hands of the judges.

3. A powerful resource of the judges lay in their right to shape and to change the forms of pleading. A party was permitted and encouraged to spread his case upon the record with a view to avoid the jury. This gave all into the hands of the judges upon a demurrer, and even without a demurrer enabled them, for various purposes, to assume all the facts to be known. The way in which libel cases were thus influenced is clearly pointed out by Chief-Judge Shaw:³ "The theory of those judges who held that the jury were only to find the fact of publication and the truth of the averments, colloquia, and innuendoes, was this: that when the words of the alleged libel are exactly copied, and all the circumstances and incidents which can affect their meaning are stated on the record, inasmuch as the construction and interpretation of language, when thus explained, is for the court, the question of the legal character of such libel . . . would be placed on the record, and therefore, as a question of law, would be open after verdict on a motion in arrest of judgment." The fierce struggle that went on over this question, ending in the statute that recognized the jury's right to give a general verdict, in cases of criminal libel, as in others,⁴ is a standing testimony to the practical importance of the question who should apply the law to the fact. The history of

¹ 1 Doug. 119 (1779-1783).

² *Patrick v. Hallett*, 1 Johns. 241 (1806); *Whittington v. Christian*, 2 Randolph, pp. 357-8 (1824); *Trot v. R. R. Co.*, 23 Gratt. pp. 619-20, 635-40 (1873). Demurrs to evidence are mainly obsolete in this country. What is called by this name now is often a very different thing.

³ *Com. v. Anthes*, 5 Gray, p. 214.

⁴ St. 32 Geo. III. c. 60. *Cap. & Counties Bank v. Henty*, 7 App. Cas. 741; S. C. 31 W. R. 157.

the jury is full of illustrations of the importance of this function. To leave to the jury, on the one hand, what is called a mixed question of law and fact, with the proper alternative instructions as to what the law is upon one or another supposition of fact, and, on the other hand, to have such a question remain with the court after the jury have reported upon the specific questions of fact, are two exceedingly different things. Within permissible limits there is generally some range of choice in matters of intent and inference; it makes a great difference who has the right to the choice. Moreover, since mistakes are possible, and even wilful error, he who wishes either of these two tribunals to judge may well prefer to have the mistake made by one rather than the other.

The modern action for malicious prosecution, represented formerly by the action for conspiracy, has brought down to our own time a doctrine which is probably traceable to the practice of spreading the case fully upon the record, namely, that what is a reasonable and probable cause for a prosecution is a question for the court.¹ That it is a question of fact is confessed,² and also that other like questions in similar cases are given to the jury. Reasons of policy led the old judges to permit the defendant to state his case fully upon the record, so as to secure to the court a greater control over the jury in handling the facts, and to keep what were accounted questions of law, *i.e.*, questions which it was thought should be decided by the judges, out of the jury's hands. Gawdy, J., in such a case, in 1601-2, "doubted whether it were a plea, because it amounts to a *non culpabilis*. . . . But the other justices held that it was a good plea, *per doubt del lay gents*."³ Now that the mode of pleading has changed, the old rule still holds; being maintained, perhaps, chiefly by the old reasons of policy. Mr. Herbert Stephen's interesting little book on "Malicious Prosecution" (Preface, and pp. 70-83) has an ingenious suggestion, viz., that the judgment in *Abrath v. N. E. R'y Co.*,⁴ supporting, as it is thought to do, a practice of asking the jury certain specific questions, and instructing them to find reasonable and probable cause or not, according to their answers,— amounts in effect to

¹ *Panton v. Williams*, 2 Q. B. 169; *Stewart v. Sonneborn*, 98 U. S. 187.

² *Lister v. Perryman*, L. R. 4 H. L. 521.

³ *Pain v. Rochester*, Cro. Eliz. 871; *Chambers v. Taylor*, ib. 900.

⁴ 11 App. Cases, 247.

suggesting a definition of this phrase, and turning the question into "a question of fact" (meaning, of course, a question of fact for the jury), whether those things were true which the definition called for.¹

The most singular product of this way of withdrawing questions from the jury was the doctrine of "color" in pleading. In St. Germain's quaint dialogue of the "Doctor and Student,"² there is an amusing, grave discussion as to the morality of the fiction of color, and incidentally an explanation of it by the Student. The discussion ends by the suggestion of the Student that it is a man's duty, out of love to his neighbor, to save the jury from the peril of a wrong finding, by avoiding the general issue wherever he can,—an argument which the Doctor agrees to ponder. In setting forth this matter, the Student states the rule that one must not plead detail which amounts only to the general issue; and yet in some cases, if he do plead the general issue, he will have to leave a point of law "to the mouths of twelve laymen, which be not learned in the law; and, therefore, better it is that the law be so ordered that it be put in the determination of the judges than of laymen." Accordingly, the party was permitted to turn his traverse into a confession and avoidance, by alleging and admitting some fictitious ground of right, not quite defensible in point of law, and then avoiding it by his detailed matter, which regularly would be only an argumentative general issue. This got his matter on the record, and at the same time the sacred rule that one must either traverse or confess and avoid moulted no feather. Form was preserved, the party had confessed and avoided; to be sure he had set up a mere fiction; but the other party was not allowed to deny it, and he *had* kept to the rules.³

4. Another way of securing for the court the application of the law to the facts was that of urging and even compelling special verdicts. It was the old law that a jury, if it chose to run the risk of a mistake, and so of the punishment by attaint, might always find a general verdict.⁴ But the judges exerted pressure to secure special verdicts; sometimes they ordered them, and enforced their instruction by threats, by punishing the jury, and by giving a

¹ Compare *Humphries v. Parker*, 52 Me. 502.

² Stephen, Pleading, Tyler's ed., 206-215.

³ c. 53.

⁴ Co. Lit. 228 a.

new trial.¹ As matter of history, we know that the jury successfully stood out against this attempt, and that their right was acknowledged.² It is interesting to notice how far judges and legislatures in this country have travelled back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions.³

5. In the mere process of guiding and supervising the jury, the judges have not only modified the manner of the jury's action in dealing with questions of fact, but have removed many such questions from their control. This has been done very extensively by laying down rules of presumption. These are sometimes not so much rules, as mere formulæ, indicating what judges recognize as permissible or desirable in the jury; but often they are strictly rules for the decision of questions of fact. If it be said that when such a rule exists the question of fact merely ceases, wholly or in part, and turns into a question of law, or, at any rate, of the application of law, over which the judges have more control, this is true; but the act of creating such a rule, inasmuch as it permanently withdraws certain questions from the jury, involves a decision by the judges, not merely of the single question of fact in the case in hand, but, thereafter, of the whole class of such questions.⁴ In the long history of trial by jury this process has always gone on, sometimes as a mere inevitable step in the work of a tribunal which regards precedent and seeks for consistency in administration, sometimes as a sharp and short way of bridling the jury. Such things were done as being mere administration, as rightly belonging to the judges, who had, what the juries had not, the responsibility of supervising the conduct of judicature and of securing the observance, not merely of the rule of law, but of the rule of right reason. But we are none the less interested to notice that the actual working of this process has transferred a great bulk of matter of fact from the jury to the court by

¹ Chichester's Case, Aleyn, 12 (1644); Gay *v.* Cross, 7 Mod. 37 (1702); R. *v.* Bewdley, 1 Peere Williams, 207 (1712).

² Mayor of Devizes *v.* Clarke, 3 A. & E. 506.

³ See Mr. W. W. Thornton's article in 20 Am. Law Rev. 366, on "Special Interrogatories to Juries." In Atch. R. R. Co. *v.* Morgan, 22 Pac. Rep. 995 (Jan. 1890, Kansas), seventy-eight questions were put to the jury, filling nearly three octavo pages, of fine print and double columns.

⁴ For a discussion of this general topic I beg to refer to an article on "Presumptions and the Law of Evidence," 3 Harv. Law Rev. 141.

the simple stroke of declaring that it shall no longer be dealt with merely as matter of fact, but shall be the subject of rules,—rules of practice, rules of good sense, *prima facie* rules of law, even conclusive rules of law; as when, in regard to the facts involved in cases of prescriptive rights, it was perceived how hard it often is to prove them, *propter brevem hominum vitam*, and the judges established the rule that when once you had given evidence running back through the term of living memory, the rest of the long period of legal memory might be covered by a presumption. It was admitted to be a question of fact and for the jury, whether it was so or not; but the judges were not content to leave it there, for they perceived the very slender weight of the evidence. "No doubt," said Blackburn,¹ "usage for the last fifty or sixty years would be some evidence of usage seven hundred years ago; but if the question is to be considered as an ordinary question of fact, I certainly, for one, would very seldom find a verdict in support of the right as in fact so ancient." And so, in such cases, the judges instructed the jury that they "ought" to find what was thus presumed; and, what was more, they enforced the duty upon *nisi prius* judges and upon juries by granting new trials if it was disregarded.²

6. It will be perceived that, in theory, the judges have almost always paid homage to the jury's separate and independent right. Seldom have they failed to do that. Yet the judges supervise and moderate their action, and herein lies one of the most searching and far-reaching grounds of judicial control,—that of keeping the jury within the bounds of reason. This function, as well as that of preserving discipline and order, belongs to the judge as the presiding officer over the exercise of the judicial function. All subordinate officials must keep within the limits of reason, even in the exercise of their own special office; and it is the judges who are to apply this rule. Reason is not so much a part of the law, as it is the element which it breathes; those who have to administer the law can neither see nor move without it. Therefore, not merely must the jury's verdict be conformable to the rules of law, but it must be defensible in point of sense and reason; it must not be absurd or whimsical. This is obviously a different thing from imposing upon the jury the judge's private standard of what is

¹ *Bryant v. Foot*, L. R. 2 Q. B. p. 172.

² *Jenkins v. Harvey*, 1 Cr. M. & R. 87.

reasonable; as, for example, when the question for the jury itself is one of reasonable conduct. In such a case, the judges do not undertake to set aside the verdict because their own opinion of what is reasonable in the conduct on trial differs from the jury's.¹ The question for the court, it will be observed, is not whether the conduct ultimately in question, *e.g.*, that of a party injured in a railway accident, was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct which the jury are judging, reasonably be thought reasonable? Is that a permissible view?

We might anticipate, as was said before in speaking of the demurrer upon evidence, that this line would often be overstepped. It often has been. It is the line which was under discussion in an important modern suit for libel,² when, in considering the power of the court in such a case, on a motion in arrest of judgment, Lord Penzance insisted that a court could not take it from the jury, if the publication was reasonably capable of a libellous construction. But it was laid down by Lord Blackburn that the court was to judge for itself; and he added, "It seems to me that when the court come to decide whether a particular set of words, published under particular circumstances, are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges, might not unreasonably hold such words to be libellous."³ That this discrimination was, probably, not fully attended to in a great many of the cases where, in one way or another, facts have been referred to the court I have already said. The point may be further illustrated by two cases on the subject of necessaries for an infant. Formerly in such cases the plaintiff, in reply to the plea of infancy, put upon the record the facts which were thought to show that what had been furnished were necessaries; this gave the opportunity for a demurrer. Nowadays these facts are not pleaded, and the question goes to the jury. Under the former practice the parties got simply the court's opinion; now they get the jury's, which may be a very different matter. The jury's

¹ *Stackus v. R. R. Co.*, 79 N. Y. 464.

² *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, s. c. 31 W. R. 157.

³ This distinction is of fundamental importance in constitutional law. Harv. Law Rev. i. 92, note: *Powell v. Pa.*, 127 U. S. 678

verdict is, indeed, subject to the court's revision; but at this stage, as we see, the court asks merely that "very different question," which Lord Blackburn mentions, whether the jury could reasonably find them to be necessaries. In *Makarell v. Bachelor*,¹ in 1597, the plaintiff sued in debt for apparel, and upon a plea of infancy, replied that the defendant "was one of the gentlemen of the chamber to the Earl of Essex, and so it was for his necessary apparel; and it was thereupon demurred. The court held that they were to adjudge what was necessary apparel; and such suits . . . cannot be necessary for an infant, although he is a gentleman." But in *Ryder v. Wombwell*,² in 1868, where a like question went to the jury, and was found for the plaintiff, the court, in granting a nonsuit on the ground that there was no evidence sufficient to warrant the verdict, laid down the general principle (1) that the court may always say, whether *prima facie*, having regard to "the usual and normal state of things," which is known to judges as well as to juries, certain things "may be" necessities; and (2) that if evidence is offered of special circumstances, changing the usual state of things, the question for the court is whether, upon the evidence, the jury could reasonably find them necessities.

It seems, then, to be thoroughly plain that the attributing to the jury of questions of fact, in our common-law system, is to be taken with the gravest qualifications. Much fact which is part of the issue is for the judge; much which is for the jury is likely to be absorbed by the judge, "whenever a rule about it can be laid down."³ As regards all of it, the jury's action may be excluded or encroached upon by the coöperation of the judge with one or both of the parties; and, as regards all, the jury is subject to the supervision of the judges in order to keep it within the limits of reason.

Before passing from questions of fact, it will be well to turn for a moment to what are called "mixed questions of law and fact," such as negligence, ownership, or insanity. What shall be said of these?⁴ It seems that there is no occasion to speak of them as

¹ Cro. El. 583.

² L. R. 4 Ex. 32.

³ *Tindal v. Brown*, 1 T. R. 167, per Lord Mansfield; Holmes' Com. Law, 122-9.

⁴ Austin (*Jurisp. i.* 236, ed. 1873) says, "They are questions neither of law nor of fact."

anything other than mere matters of fact. The circumstance that in order to deal with them it is necessary to know what the legal definition is, does not really affect the matter.¹ It is sometimes necessary that the jury should be advised as to the ordinary definitions of the dictionaries; but this is needed only to give precision to their inquiry, and does not alter the nature of it. So of any legal definition. The meaning of "burning," in the law relating to arson, is a highly technical one; and so of "breaking and entering," in burglary; because a definition must be given, is it any the less a simple question of fact whether an accused person has burned or broken and entered a given house? And so of such questions as title to property, or insanity. Equally, where the courts or statutes have fixed the legal standard of reasonable conduct, *e.g.*, as being that of the prudent man, the determination of whether any given behavior conforms to it or not is a mere question of fact.² That in reaching their conclusion the jury must reason, and must "judge the facts," is not material, as we have already seen; always they must do that; the difference in this respect between these cases of reasonableness and others is simply one of more or less.³ It is, indeed, to be recognized, as we have seen, that such questions become, from time to time, the subject of more specific legal rule or definition, as in the case of notice of the dishonor of a bill of exchange. But where that has taken place, all that has happened is a change in the legal rules; the rule of "reasonableness" is either displaced or narrowed. When once the exacter rule is known, what is left is none the less a mere question of fact.

V. As to the other aspect of the maxim, that which excludes the jury from the law, the rule seems to be in a far simpler condition. From the beginning, indeed, it was perceived that any general verdict, such as no disseisin, or not guilty, involved a conclusion of law, and that the jury did, in a sense, in such cases

¹ See, for example, *People v. Hawkins*, 109 N. Y. p. 411.

² *Eaton v. Southby, Willes*, 131; *Haskins v. Ham. Co.*, 5 Gray, 432.

³ Vaughan, C. J., in *Bushell's Case* (Vaughan, p. 142), in speaking of the ordinary sort of question, says: "The Verdict of a Jury and Evidence of a witness are very different things in the truth and falsehood of them. A Witness swears but to what . . . hath fallen under his senses. But a Juryman swears to what he can inferr and conclude from the Testimony of such Witnesses by the act and force of his Understanding to be the Fact inquired after, which differs nothing in the Reason, though much in the Punishment, from what a Judge, out of various Cases considered by him, inferrs to be the Law in the Question before him."

answer a question of law. That was the very ground of some of the arrangements already mentioned for removing the final question from them. Moreover, in many criminal cases their verdict could not be controlled. "It was never yet known," said Pratt, C. J.,¹ "that a verdict was set aside by which the defendant was acquitted in any case whatsoever, upon a criminal prosecution." In such cases the judge could not govern their action; he could simply lay down to them the rule of law; and this it was their duty to take from him and apply it to the fact. Now, although this might be their duty, yet since, in some cases, there was in the judge no power of control or revision, it was evident that the jury had the final power to find the law against the judge's instruction. This power, where it was uncontrollable, has been considered by some to be not distinguishable from a right; and it is not at all uncommon to describe it thus, as a right to judge of both law and fact. In the first trial by jury at the bar of the Supreme Court of the United States, in 1794, Chief-Justice Jay, after remarking to the jury that fact was for the jury and law for the court, went on to say: "You have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."² But I am disposed to think that the common-law power of the jury in criminal cases does not indicate any right on their part; it is rather one of those manifold illogical and yet rational results, which the good sense of the English people brought about, in all parts of their public affairs, by way of easing up the rigor of a strict application of rules.

It seems, then, that whatever power over questions of law has fallen into the hands of juries, in the actual working of our legal machinery, yet it is the duty of the judges to give them the rule, and their duty, in point of theory, to follow the rule thus ascertained. We may probably still quote with approval Hargrave's note³ as being an accurate statement of the common law.

One or two peculiar situations should be here referred to.

(1.) In determining what is the law of the domestic forum, the

¹ King *v.* Jones, 8 Mod. 201, at p. 208 (1724).

² Georgia *v.* Brailsford, 3 Dallas, 1. See the remarkable collection of authorities in support of this view in a note to Erving *v.* Cradock, Quincy's Reports, 553, 558-572, understood to have been prepared by Horace (Mr. Justice) Gray. Compare 1 Bishop, Crim. Proc., 3d ed., sects. 977, 983-988; 2 Thomp. Trials, sect. 2133; Pierce's Life of Sumner, i. 330.

³ Co. Lit. 155 b, note 5.

courts settle all questions relating to the *factum* of the law, *e.g.*, whether, in enacting a statute, a specific requirement of the constitution as to the forms of enactment has been complied with. But, as regards foreign laws, it is held that the question of their existence is wholly for the jury. This is said, on the theory that such laws are mere matters of fact; and so of the questions incidental to the ascertainment of them. Now, two things seem to be true: (*a*) that in an exact sense, as we have seen, these questions are questions of fact, and that equally the same questions about domestic laws are questions of fact; (*b*) that if the *factum* of domestic law is for the court, equally the *factum* of foreign law should be,—assuming it to be true that it is wanted, in order to determine the rule or law of the case. Such law, as well as the domestic law, should be determined by the judge. The circumstance that while the domestic law does not need to be proved by "evidence," strictly so called, foreign law must be so proved, is not material. In reason the judges might well enough be allowed to inform themselves about foreign law in any manner they choose,¹ just as the judges of the Federal courts notice without proof the laws of all the States. But since it is required to be proved, it should be proved to the judge.² The doctrine, however, that it is for the jury has a wide acceptance; and, so far as it goes, if this is not a deduction from the general principle that the jury are not to answer to law, it is at least a departure from the mode of applying that principle in the case of domestic law; for as we have seen, a question of fact relating to law which in the latter case is attracted to the tribunal that deals with law, in the other case is not. Consistency and principle would give the last case also to the judges.

(2.) Another situation may be mentioned. The relation of the judge to the jury is necessarily one of mutual assistance. As the judges give the jury advice, information, and aid touching the jury's special province, so they call upon the jury for assistance in determining their own questions. The method of the chancery judges, of referring a question for trial to a common-law jury, in order to inform and aid them, giving, however, to a jury's verdict such weight as the judge thinks best, may indicate the nature of this thing. Questions of facts, in equity, are for the judge, but he

¹ It was judicially noticed in *State v. Rood*, 12 Vt. 396

² *Pickard v. Bailey*, 26 N. H. 152; *Lockwood v. Crawford*, 18 Conn. 361 (by statute); *Story, Confl. Laws*, s. 638; 1 *Grif. Ev.* s. 486.

profits sometimes by the advice of a common-law jury. So courts of common law, in construing a writing, sometimes ask the jury for the mercantile meaning or understanding of it,—not because they intend to leave the decision of the question to them, but in order to profit by their opinion; just as Lord Mansfield and others built up the commercial law by taking the opinion of special juries and their reports as to mercantile usage, and founding rules of presumption upon them when they appeared to be reasonable. To aid them in the construction of writings, judges may well have the evidence of mercantile experts.¹ And, on the same principle, they may take the opinion of a special jury; and may submit to any jury any proper question, that is to say, any question depending upon a judgment of matters which the jury may fairly be supposed to know more about than the court. In such cases, instead of first receiving the opinion of the jury and then deciding the point, a judge may leave the question to them with contingent instructions, *e.g.*, that if they find that the usage, custom, understanding, or practice of merchants is so and so, then they shall find so and so as to the interpretation of a certain contract or a certain transaction. A good illustration of this is found in *Hawes v. Forster*.²

In the great case of *Lickbarrow v. Mason*, where were brought in question the respective rights of an unpaid seller of goods, and of one who, in good faith, without notice and for value, had bought from the first buyer, taking an indorsement of the bill of lading,—after the case had gone to the House of Lords on a demurrer upon the evidence, and had been sent back to a new trial for informality in the demurrer, the jury, at the new trial, in accordance with the judge's request, found a special verdict, stating the facts and adding the understanding and custom of merchants as to the rights of the parties under such circumstances. Thereupon the court, "understanding that the case was to be carried up," gave judgment, without reasons, for the plaintiff, who represented the sub-vendee. The case was settled, and was never carried up. Now, as regards the law upon this important point, two-thirds of the twelve judges who had been concerned in the case had been against the final opinion of the King's Bench, the one which accorded with the famous advisory opinion of Mr. Justice Buller to the Lords. Yet the law has always been considered as

¹ As in *Pickering v. Barkley*, Style, 132.

² 1 Moo. & Rob. 368; s. c. Lang. Sales, 410.

settled in accordance with the final judgment in the King's Bench and with the opinion of merchants as recorded in the special verdict there. "It is probable," says Blackburn, "that the finding of the jury of the custom of merchants had great weight."¹ The true significance of such a thing as this, the inserting in the verdict of the understanding and custom of merchants on a question of doubtful interpretation as to the meaning and legal result of certain commercial transactions, can only amount to a mode of assisting the court by the judgment of experts. The court need not follow it; it is not a determination which has any binding force; but it does present to the court a fact which may properly weigh with them in reaching a conclusion, just as the judgment of an expert witness presents to a jury a fact which may properly weigh with them in reaching their own independent conclusion upon the same point. The value of a knowledge of "the custom among merchants" in interpreting mercantile contracts and transactions had been emphatically recognized by Lord Harwicke a generation earlier.² A straightforward look at this sort of thing is taken by Lord Esher, in a late English case involving the construction of a policy of insurance.³ "Anything," he says, "more informal, inartistic or ungrammatical than those policies or charter parties cannot be found, and until recently whenever a point arose as to their meaning our judges almost invariably took the opinion of the jury upon the question. They did not merely take the evidence of custom, they asked juries what their view of the contract was, and I myself should have been prepared to take the opinion of a jury on this point as a matter of business. It is said that there is this difficulty, that it would be necessary to take the evidence of average adjusters, and that these adjusters have proclaimed that they do not act upon any customs of merchants, but that they endeavor to follow the law. But I should have suggested

¹ Sale, 288. And so Christian, *Bankruptcy*, ii. 406: "As the decision of the Court of King's Bench, . . . though no reason was given, seems to be considered the present law, I presume it arises from the finding of the jury that the property in the goods is transferred by the blank indorsement and transmission of the bill of lading." As an original question, both Blackburn and Christian agree with the opinion of Lord Loughborough, as against Mr. Justice Buller and the King's Bench.

² *Ekins v. Macklish, Ambler*, 184 (1753); *Kruger v. Wilcox*, ib. 252 (1755). And so in the common-law courts, *Fearon v. Bowers*, 1 H. Bl. 364, *note*; and a hundred years before that, *Pickering v. Barkley, Style*, 132.

³ *Stewart v. Merchants' Mar. Ins. Co.*, 16 Q. B. D. 619, 627; s. c. 34 W. R. 208, 210.

that merchants should also be called as witnesses, and that the jury should decide after having heard the whole evidence.

The simple truth in such cases appears to be, that the court, whether or not they be quite ready as yet to adopt the opinion which they ask, as giving the legal rule, are wishing to know that opinion, as an aid to them, in laying down the law. They are not cases of submitting questions of law to the jury.

James B. Thayer.

CAMBRIDGE.

TOTAL DISABILITY IN ACCIDENT INSURANCE.

THE holder of an accident insurance policy is insured, so runs the policy of the day, "against loss of time not exceeding twenty-six weeks resulting from bodily injuries effected through external, violent, and accidental means which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation."

In what cases will the courts rule that he is totally disabled within the meaning of this policy? Do these words mean that to recover he must be so disabled as to be prevented from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation, or must he be so disabled as to be prevented from doing any and every kind of business pertaining to his occupation? In other words, is there a difference in being able to perform any part of one's business, and any and every kind of business pertaining to one's occupation?

For instance, suppose that the insured was a billiard-saloon keeper, that he could do some of the acts necessary to be done in the business of billiard-saloon keeper, but was wholly disabled from doing many of the material acts necessary to be done in that business. Is such a man "totally disabled" within the meaning of the policy as interpreted by the courts?

Or, again, suppose the case of a merchant grocer seriously injured in his foot, who after a few days of confinement in the house was able with great exertion to get into his buggy and superintend a small part of his business, though for the whole period of twenty-six weeks he was unable to do substantially all kinds of his accustomed labor to some extent. Can he recover under such a policy?

As the great majority of accidents do not incapacitate a man from all labor whatsoever, but often leave him in a condition to perform some work, though it may be a very small part of his regular duties, it is a question of importance whether under such

circumstances the insurance companies will be obliged to pay the holders of their policies the weekly allowance provided for by the contract.

The law on this point is unsettled. The Supreme Court of Wisconsin has recently decided, in the case of the merchant grocer just put, that the insured could not recover; and the Supreme Court of Maine, about a year later, in the case of the billiard-saloon keeper, reached an opposite conclusion.

An examination of the earlier cases is instructive, as they have exerted a considerable influence upon the present state of the law, although the language of the policies passed upon in them is materially different from the language of the policy in general use to-day.

The first case — at least the first of any importance — was *Hooper v. Accidental Death Insurance Company*, 5 H. & N. 545, decided in 1860.¹

In this case the policy of insurance against accident held by the plaintiff contained this clause, "that in case such accident shall not cause the death of the injured immediately, but shall cause any bodily injury to the injured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, the company will pay to the said insured," etc.

The injured party was a solicitor, registrar of a county court, and clerk to the Guardians of the Poor. He sprained his ankle so seriously that he was unable to put his foot to the ground, or to leave his room, for some weeks. During this time, however, he could give directions to his clerk, write letters, etc., while lying on his sofa; but he could not pass his accounts as registrar, or keep any of his engagements with his clients. The court held that the plaintiff could recover. Pollock, C. B., referring to the policy, said: —

"We must, therefore, endeavor to find out what is the true meaning of the language used in the policy. It may well be that the sense intended to be conveyed was, that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the company would be liable. That is the case here: the plaintiff might

¹ It should be remembered that the business of accident insurance is of comparative recent origin. Its growth within the last few years, however, has been surprising. One company alone has paid out over a million dollars in accident claims within the last year.

and could have done something which he was in the habit of doing before, but he was wholly incapable of doing that which he usually did before. If a man is so incapacitated from following his usual business, occupation, or pursuits as to be unable to do so, he is 'wholly disabled' from following them. His 'usual business and occupation' embrace the whole scope and compass of his mode of getting his livelihood."

The decision was subsequently affirmed by the Exchequer Chamber, 5 H. & N. 556.

This case was followed in *Sawyer v. The United States Casualty Company*, 8 Am. Law Reg. N. S. 233, decided in 1869 in the Superior Court of Massachusetts. The plaintiff, a farmer, was injured by a fall. He was obliged to hire a man to do what he formerly did, although he could still do some light work, such as milking, riding about the farm, and superintending the work. His policy read, "absolutely and totally disable him from the prosecution of his usual employment." The plaintiff recovered, under the following instruction of the court: "The mere fact that a man cannot do a whole day's work, or that by a day's work he cannot accomplish so much as before the accident, is not sufficient to entitle him to recover, but he must satisfy you that for a time, by reason of his accident, he is deprived of the power to do to any extent substantially all the kinds of labor which constituted his usual employment."

In 1877, *Lyon v. The Railway Passenger Assurance Company*, 46 Ia. 631, was decided. This was a one-day policy, reading, "totally disabled and prevented from the transaction of all kinds of business." The court below said that this language, construed in a practical sense, meant inability to follow any occupation, business, or pursuit, in the usual way, and that the fact that the plaintiff may do some light parts of the work when he cannot engage in the work itself to any practical extent, will not prevent a recovery. The court reversed this instruction in the following opinion: —

"These instructions are, it seems to us, clearly erroneous. The parties must be bound by the terms of their contract. The contract of insurance provides that the defendant will indemnify the assured against loss of time while *totally disabled and prevented* from the transaction of *all kinds* of business solely by reason of bodily injuries effected through outward accidental violence. The fourth instruction

construes the contract to mean something entirely different. The jury are directed that plaintiff may recover though he may be able to do some parts of the accustomed work pertaining to his business, so long as he cannot to some extent do all parts and engage in all the employments thereof. Almost total soundness and ability, instead of total disability, is made the condition of plaintiff's right to recover, and of defendant's liability. The plaintiff is a carpenter. If he was simply disabled from going upon a four-story building to put on the roof, and could do everything else pertaining to his trade, he would under this instruction be entitled to recover fifteen dollars a week during the period of such disability. This is not the proper construction of the agreement. It interpolates into it terms and conditions upon which the parties never agreed, and attaches to the words employed a meaning of which they are not susceptible."

In *Saveland v. Fidelity and Casualty Company*, 67 Wis. 174 (1886), the case of the grocer referred to *supra*, the judge ruled at the trial that the plaintiff was entitled to recover for such time as by reason of the accident he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent." The court reversed this ruling, holding that "the plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to his occupation," and cited with approval *Lyon v. Railway Passenger Assurance Company*, *supra*.

In *Young v. Travelers Insurance Company*, 80 Me. 244 (1888), the case of the billiard-saloon keeper, the court below ruled that the meaning of the language was, "not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or to any part of his business pertaining to his occupation as billiard-saloon keeper, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation." The court upheld these instructions, saying, "He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only,

he was as effectually disabled from performing his business as if he could do nothing required to be done; and while remaining in that condition he would suffer loss of time in the business of his occupation." Hooper *v.* Accidental Death Insurance Company was relied on as an authority for the position taken. Saveland *v.* Fidelity and Casualty Company, although decided over a year previously, was not cited by court or counsel.

Such are the decisions of the courts on this subject.¹ The last two are the only ones which directly bear upon the interpretation of the policy in use at the present day, but the influence of the others can be felt in these.

The weight of authority, although slight, seems to be with the Wisconsin case. The vigorous language of the court in Lyon *v.* Railway Passenger Assurance Company leaves little room for doubt that it would have agreed with the Wisconsin court. On the other hand, it is hard to see how Hooper *v.* Accidental Death Insurance Company supports the decision of the court in Young *v.* Travelers Insurance Company. In the English case, and in the case in the Massachusetts Superior Court which followed it, the language of the policy was very loose. In the former, Wilde, B., said, "Surely 'wholly disabled' is equivalent to quite disabled, and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as '*unable to do any part of his business;*'" and Pollock, C. B., said, "It may be said that here there is a total loss of part as distinguished from a partial loss of the whole." In the policy before us, however, can it be said that the total loss of part is enough for a recovery when the requirement is that there should be a total loss of "any and every kind of business pertaining to the occupation"?

If the weight of authority seems to be with the Wisconsin court, still more does the weight of rhetoric, if I may use the expression, point to the conclusion reached by that court. "Business" means "that by which one earns a livelihood." "Occupation," though sometimes used synonymously, is a broader term. A man is a lawyer by occupation. His business, *i.e.*, "that which busies him," may be the arguing of cases, or it may be the preparation

¹ Rhodes *v.* Railway Passenger Insurance Company, 5 Lans. 77, and Accident Insurance Company *v.* Crandal, 120 U. S. 527, are often cited on the subject under discussion, but a careful examination of these cases will show that they are not in point.

of briefs, or the care of trust property, or the drawing of deeds, or the searching of titles. To recover, he must be totally disabled from doing any of these various kinds of business. Again, take the case of a country store-keeper who is accustomed to keep his books, wait on customers, make change, etc. Suppose that his knee is injured, but that he can be taken to his store daily, can sit at his desk, make change, keep his accounts, keep up his correspondence, etc., but is obliged to hire a clerk to wait upon his customers. He ought, perhaps, to be protected by an accident policy, but he is certainly not protected by one which says that he cannot recover unless he is totally disabled from the transaction of any and every kind of business pertaining to the occupation of store-keeper. Keeping the books, or making change, is certainly a "kind of business" which a store-keeper has to perform.

On the other hand, "business" must not be confounded with "labor." A lawyer can write letters; that is labor, but it is not a kind of business pertaining to his occupation. A typewriter, however, who can write letters, can pursue an important "business pertaining to his occupation." To recover, therefore, a man does not have to remain flat on his back, fearing that the raising of his hand will drive away the benefits of his policy. He can labor all he desires, as long as he does not perform, even partially, any kind of business pertaining to his occupation. From this point of view the policy is not such a "delusion and a snare" as the Supreme Court of Maine has seen fit to call it. But even so, the remedy is not for the courts to stretch the construction of the language beyond its meaning, so that "totally disabled" means "partially disabled," but rather for the public to force the insurance companies to issue policies for partial disability by refusing to buy the present "total disability" policy.¹

Marland C. Hobbs.

BOSTON, MASS., October, 1890.

¹ NOTE.—If, for instance, the insured can show by doctors' certificates and other competent evidence that he can do but one-half the amount of work he formerly did before the accident, let him recover one-half the weekly allowance due on proof of total disability. The nearest approach to this, of which I know, is the provision for the payment of a certain sum in the case of the loss of an arm, a leg, or an eye.

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A MOST instructive view of the legislation of the past year is presented in the address delivered at the last meeting of the American Bar Association, by the President, Hon. Henry Hitchcock.¹ From the two hundred and nineteen public acts of Congress, and the eight thousand two hundred and ninety-four acts and joint resolutions passed by the twenty States which enacted laws during the year, Mr. Hitchcock has selected and summarized the most important. One of the most striking facts is the tendency toward paternal government shown by the enactment of numberless regulations upon trade and manner of life. As a single instance may be mentioned a statute in Michigan, "requiring the words 'skimmed milk' to be painted in letters an inch long on all vessels containing milk for sale from any part of which the cream has been removed."

Another fact, especially worthy of notice, is the extent to which the constitutions of the newly admitted States carry out the tendency, already well developed in the more modern American constitutions, to narrow the field for legislative action by endless constitutional provisions covering subjects more properly to be dealt with by statutes. Mr. Hitchcock also notes the facts that many of the State constitutions restrict their legislatures to general, as distinguished from private, legislation; and that thirty-nine out of the forty-four States prescribe biennial, instead of annual, sessions. He refuses, however, to draw the conclusion, often suggested, that these facts show a distrust of representative institutions, or, in the words of Mr. Bryce, that "this method of restricting legislative opportunities for mischief, though a consistent application of the Puritan doctrine of original sin, is rather a pitiful result for self-governing democracy to have arrived at."

Mr. Hitchcock, on the contrary, regards these restrictions as but another application of that characteristic principle of American government, the "check and balance" system. The mere fact that, because legislatures have been running wild, certain checks have been imposed, shows not the failure of democracy, but rather its power to regulate and keep under control its own machinery.

¹ A YEAR'S LEGISLATION. The President's Address at the Thirteenth Annual Meeting of the American Bar Association, August 20, 1890. Dando Printing & Publishing Co., Philadelphia.

WITHIN the last few weeks three very interesting cases have come up in the Supreme Court of Massachusetts in the matter of liquor sold in private clubs in a prohibition town. These cases decide that such clubs are within the prohibition of the statute, and are common nuisances.

The first case is that of *Commonwealth v. Jacobs*, the steward of the Warren Social Club, of Worcester. Defendant had been accustomed to order large quantities of liquor from wholesale dealers. This liquor was brought to a place kept by the club, and stored there, under the supervision of the steward, in the names of individual members, who called for it from time to time as they wanted it. The court held that this was as much within the provisions of the statute "as if the liquors were bought and dispensed as the property of the club."

In the second case, that of *Commonwealth v. Ryan*, steward of the Pelican Club, of Worcester, it appeared that the members had attempted to evade the statute by having a number of lockers, one for each member; in each locker was stored a quantity of liquor, each bottle being labelled with the name of the owner. The defendant was duly convicted, and the court, in affirming the conviction, said that "there was evidence from which a jury might have inferred" that the arrangement in question was "a mere device to cover up the unlicensed sale of intoxicating liquors. The court could not say, as a matter of law, that there was no evidence to warrant a conviction."

The third case was that of *Commonwealth v. Baker*, steward of the Commercial Social Union, of Worcester. Defendant set up the defence that the club did not fall within the provisions of the statute, which declares that "all buildings or places used by clubs for the purpose of selling, distributing, and dispensing intoxicating liquors to their members or others, shall be deemed common nuisances."¹ The club in question owned no liquor itself, and only dispensed it to those of its members to whom it belonged. Defendant contended that the statute did not prohibit the use of rooms for such a purpose, but the court denied the force of the contention in the following passages from the opinion: —

"A place must be equally a nuisance under the statute whether used by a club to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquors owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually.

"If the club, by its agent, purchased and stored intoxicating liquors for its members, and dealt out in portions to each member, upon his order, the liquor belonging to and kept for him, and kept the place for that purpose, the place is a common nuisance under the statute.

"The club in the case at bar used its rooms for a purpose for which a license was required. It not only had no license, but it was in a city where such license is prohibited. As the evidence not disputed by the defendant showed that the club used its rooms for the purpose of dispensing intoxicating liquor to its members, it is unnecessary to consider whether, upon the whole evidence, the jury could properly have found that the club used the place for the sale of intoxicating liquor."

In view of these decisions, it will be practically impossible for clubs formed and incorporated for "purposes of social intercourse" to keep

¹ Mass. Rev. Sts. 1887, c. 206.

within their walls liquor of any description — that is, of course, in a prohibition town ; and apparently no device which the ingenuity of their members can suggest, would be sufficient to exempt them from liability under the statute. The words of the statute are "all buildings or places used by clubs for the purpose of selling, distributing, and dispensing," etc. In order to escape liability, the defendant would have to prove that the club was not used for the purpose mentioned. To do this, he would probably have to show that the club itself does not own any liquor ; that it does not sell, distribute, nor dispense it ; that each member keeps at the club — as he might with impunity at his private house — a private stock of liquor, which, if purchased for him by the steward of the club, must be shown to have been purchased by his special authority, and not by that of the club, the steward being his agent, and not the agent of the club ; and that payment for the liquor was made by him to the dealer, and not to the club. Even if he proved all this, the courts would probably find some means of bringing the club within the meaning of the statute.

It may be of interest to print the following extract from the report of the committee, consisting of Lord Coleridge and other distinguished persons, which was appointed by the Lord Chancellor in 1881 to investigate the desirability of changes in the procedure of the High Court of Justice. In his article on the Burden of Proof, in the May number of this REVIEW,¹ Professor Thayer refers to this report. It appeared in full in the "London Times," of Oct. 8, 1881, but, so far as we know, has not been reprinted.

"The committee had, in the first place, to consider how far it was desirable, in order to expedite the proceedings in an action, to combine with the writ of summons a statement of the plaintiff's demand, to which the defendant, when he appeared, might be required to put in his answer. The committee directed an examination to be made of the judicial statistics for 1879, with the view to the solution of this and the other questions relating to procedure submitted for their consideration, and the following results have been arrived at: In the year 1879 there were issued in the divisions of the High Court in London — writs, 59,659. Of the actions thus commenced, there were settled, without appearance, 15,372, *i.e.*, 25.68 per cent.; by judgment by default, 16,967, *i.e.*, 28.34 per cent.; by judgment under Order XIV., 4,251, *i.e.*, 7.10 per cent.; total of practically undefended cases, 36,590, *i.e.*, 61.12 per cent.; cases unaccounted for, and therefore presumably settled or abandoned after some litigation, 20,804, *i.e.*, 35.10 per cent. The remaining cases were thus accounted for: Decided in court, — for plaintiffs, 1,232; for defendants, 521; before masters and official referees, 512; total, 2,265; that is, 3.78 per cent. of the actions brought. From these figures it seemed clear that the writ in its present form was effective in bringing defendants to a settlement at a small cost, and that it was undesirable to make any alteration by uniting it with a plaint or other statement of the plaintiff's cause of action, which would add to the expense of the first step in the litigation.

"In the next place, the committee had to consider how far it was possible, in those cases in which litigation was continued after the appear-

ance of the defendant, to adopt a procedure (1) for ascertaining the cases in which there is a real controversy between the parties; (2) for diminishing the cost of litigation in cases which are fought out to judgment. The committee is of opinion the questions in controversy between litigants may be ascertained without pleadings. In the 20,804 cases which, as appeared from the statistics of 1879, were either settled or abandoned without being taken into court, it may reasonably be supposed that pleadings were of little use. Of the cases which go to trial it appears to the committee that in a very large number the only questions are — Was the defendant guilty of the tortious act charged, and what ought he to pay for it? or, Did the defendant enter into the alleged contract, and was it broken by him? And in a great many others the pleadings present classes of claims and defences which follow common forms. We may take, for instance, the disputes arising out of mercantile contracts for sale, of affreightment, of insurance, of agency, of guarantee. The cases of litigants are usually put forward in the same shape, the plaintiff relying on the contract and complaining of breaches; the defendant, on the other hand, denying the contract or the breaches, or contending that his liability on the contract has terminated. The questions in dispute are, as a general rule, well known to the plaintiff and the defendant. It is only when their controversies have to be reproduced in technical forms that difficulties begin."

THE application of the maxim *Sic utere tuo ut alienum non iudas* to adjoining land-owners has given the courts much difficulty, and the law on the subject is by no means clear; but it is safe to say that few cases have gone so far as *Reinhardt v. Mentasti* (42 Ch. D. 685), decided last year in the Chancery Division in England. The defendant in that case, who kept a hotel in a part of London where, as the court said, hotels were conveniently built, used in his kitchen a stove "of an ordinary character and well constructed." Kekewich, J., while admitting that this use of the defendant's property was perfectly reasonable, granted an injunction because the stove and the hot-air shaft connected with it raised the temperature of the plaintiff's wine-cellars, on the other side of the partition wall, and made it unfit for the purpose of storing wine. He relied much on the case of *Broder v. Saillard* (2 Ch. D. 692), (a case of noise from a stable, which seriously interfered with the plaintiff's sleep; it may be observed that the stable was built, in the language of Jessel, M. R., "not as stables usually are, but next to the wall of the plaintiff's dwelling-house"), and treated the reasonableness of the defendant's acts as immaterial, regarding the inquiry whether the plaintiff had suffered damage as the sole test. "The real question is, does he [the defendant] injure his neighbor?" So literal an interpretation of the maxim *Sic utere tuo* seems to call for the remark of Earl, J., in *Campbell v. Seaman* (63 N. Y. 568, 576), "It does not mean that one must never use his own so as to do any injury to his neighbor or his property; such a rule could not be enforced in civilized society." As the law is laid down in *Reinhardt v. Mentasti*, the question of reasonableness seems to be somewhat one-sided; from the defendant's point of view the court's solicitude for the plaintiff's wine-cellars at the expense of his cooking-stove cannot seem altogether reasonable.

It is true that *Hole v. Barlow* (4 C. B. N. S. 334), which laid it

down broadly that what would otherwise be a nuisance could be justified by showing that it was done in a "convenient place," was overruled in *Bamford v. Turnley* (3 B. & S. 62); but the language of the court in the latter case is worthy of attention as indicating the exact scope of the decision. Bramwell, B., for example, who concurred in overruling *Hole v. Barlow*, said that "those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action," though the same acts would be nuisances if done wantonly or maliciously. And the leading case of *St. Helen's Smelting Co. v. Tipping* (11 H. L. C. 642) shows that the principle on which *Hole v. Barlow* was decided cannot be wholly ignored, that the court cannot escape considering the nature and reasonableness of the act complained of. According to the charge of Mellor, J., of which the House of Lords expressed particular approval, "everything must be looked at from a reasonable point of view," and the jury must take into account "all the circumstances, including those of time and locality." In view of such expressions as these, and of Vice-Chancellor Knight Bruce's well-known observation in *Walter v. Selfe* (4 De G. & Sm. 315, 322), that the test is not to be found in "elegant and dainty modes and habits of living," but in the "plain and sober and simple notions among English people," one is not very seriously impressed with the damage suffered by the plaintiff on such facts as appear in *Reinhardt v. Mennasti*.¹ Moreover, as is pointed out in 6 Law Quarterly Review, 114, it is not altogether easy to reconcile the decision with *Robinson v. Kilvert* (41 Ch. Div. 88), where a similar radiation of heat from the defendant's boilers, not great in itself, but causing serious damage to delicate processes of manufacture carried on by the plaintiff, was held by the Court of Appeal not to be a nuisance.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

MENS REA IN CRIMINAL CASES. — (*From Mr. Chaplin's Lectures.*) — One often finds the rule laid down that the *mens rea*, or criminal intent, must always be proved in order to maintain a criminal prosecution. This, however, is far from true, or at most can only be stated as a general principle subject, like most general principles, to limitations.

I. It is not always and invariably essential at common law that one should have a criminal, or even a wrongful, intent. In cases, for example, of religious belief, it has been held unnecessary to prove the *mens rea* (as where a father, believing it sinful to seek medical aid in time of sickness, rather than to have faith in prayer, was charged with the death of his infant son).² In the case of *Rex v. Ogden*,³ where the prisoner was indicted for unlawfully transposing from one gold ring

¹ Compare the remarks of Dodderidge, J., in *Jones v. Powell*, Palmer, 536: "Si homine est cy tendes nosed que ne pnit inducer Seacole it doit lesser son mease."

² *Reg. v. Downes*, 13 Cox, C. C. 111.

³ 6 C. & P. 631.

to another the mark of the Goldsmiths' Company, it was found that there was absolutely no intent on his part to defraud; yet he was convicted. In such cases, the intent, so far from being criminal, is good; but the courts go upon grounds of public policy. The same principle is expressed in a case in the United States Supreme Court,¹ and has been discussed and followed in a number of cases in Massachusetts.²

II. In general, however, a wrongful, though not necessarily a criminal, intent is essential. This must be interpreted in a very conventional manner, as fixed by the constructions of the courts. But there are qualifications of this principle, viz.: —

(1.) It is not necessary that the intent should be to do the act specified. For example, where a woman, in attempting to commit suicide, shot the man who was interfering to save her, she was held guilty of manslaughter.³

(2.) Where there is an intent to do a wrongful act, and the results are more serious than was contemplated, but are in the natural line of what was done, the wrong-doer is deemed to have intended the complete act which was done. For example, if A strikes B, and as a result of the blow B dies, A is guilty of manslaughter.⁴

(3.) When one's accomplice in a proposed wrong goes further in the perpetration of it than was contemplated, one is deemed to have intended all that his accomplice actually does. For example, A and B go out with the purpose of robbing C; A kills C by mistake; then B is liable, though he took no part in the killing, and had not the remotest idea that A would accomplish it.⁵

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — FRAUD — REMEDIES OF PRINCIPAL.— The commissions which an agent corruptly receives in return for dealing with a particular firm, cannot be followed by the principal into the agent's investments. The relation between the defendant and the plaintiffs is that of debtor and creditor, not trustee and *cestui que trust*. *Lister & Co. v. Stubbs*, 45 Ch. Div. 1 (Eng.).

AGENCY — FRAUD — REMEDIES OF PRINCIPAL.— Where an agent, in return for a bribe, induces his principal to pay for an article more than its market price, the principal has two distinct and cumulative remedies. He can recover such bribes from the agent as money had and received to his use, and may also, without deducting the above amounts, recover from the agent and the briber, jointly or severally, damages for any loss he may have sustained by such purchase in excess of market rates. *Mayor, etc., of Salford v. Lever*, 25 Q. B. D. 363 (Eng.).

BILLS AND NOTES — QUALIFIED ACCEPTANCE.— Acceptance of a bill of exchange "in favor of" the payee "only," does not render the bill non-negotiable. It is not a qualified, but a general, acceptance. *Decroix & Co. v. Meyer & Co.*, 25 Q. B. Div. 343 (Eng.).

CONTRACTS — ACTION BY BENEFICIARY.— B., for a consideration, contracted to support A.'s wife, and save A. and his estate free from all claims by her, and gave

¹ *U. S. v. Reynolds*, 98 U. S. 145.

² *Com. v. Mink*, 123 Mass. 422.

³ *Reg. v. Jackson*, 7 Cox, C. C. 357.

⁴ For example, *Com. v. Mash*, 7 Met. 472.

⁵ *Reg. v. Bradshaw*, 14 Cox, C. C. 83.

a mortgage to secure the contract. *Held*, that the wife could enforce the contract by a bill to charge the mortgaged property with her support. *Coleman v. Whitney et al.*, 20 Atl. Rep. 322 (Vt.).

CONTRACTS — ILLEGALITY — PUBLIC POLICY. — Action upon a promissory note. The note was given by the defendant in payment for forty bushels of oats, bought by him at fifteen dollars per bushel. A part of the contract was that the vendor should within a year sell for the defendant eighty bushels of oats at fifteen dollars per bushel. *Held*, that this contract, though not a gambling contract, was yet void as against public policy. For it cannot be carried out without defrauding somebody. Hence the note was void. *Merrill v. Packer*, 45 N. W. Rep. 1076 (Ia.).

CONVERSION — UNAUTHORIZED SALE OF STOCK. — The defendants held one hundred shares of stock subject to the plaintiff's order. On an order purporting to come from him, they sold one hundred shares; but they had on hand during the whole transaction at least one hundred shares of that stock over and above all claims. The court held that the defendants were not bound to have on hand any particular certificate, and that therefore they were not guilty of conversion. *Caswell v. Putnam*, 24 N. E. Rep. 287 (N. Y.).

CORPORATIONS — TAX ON FRANCHISE. — A New York statute provides that all corporations, with certain exceptions, that do business within the State shall be subject to a tax upon its "corporate franchise" to the amount of a certain per cent. upon its capital stock. *Held*, that the tax is upon the privilege of being a corporation and not on the capital stock. It therefore is not rendered invalid because part of the capital stock is invested in United States bonds. Miller and Harland, JJ., dissenting. *Home Ins. Co. of New York v. State of New York*, 10 Sup. Ct. Rep. 593.

EQUITY JURISDICTION — ASSIGNMENT OF PATENTS BY MASTER. — The statutes of Massachusetts give authority to the court to assign choses in action, and therefore the court will decree that the master make and deliver an assignment of letters-patent if the defendant refuse to assign them, although the court has not possession of them. W. Allen and Field, J.J., dissenting both on the right of the court to act *in rem* in such a case and on the power of the court to make any effectual assignment without at least the possession of the letters-patent. *Wilson v. Fire Alarm Co.*, 24 N. E. Rep. 784 (Mass.).

EQUITY JURISDICTION — INJUNCTION OF CRIMINAL PROCEEDINGS — SALES IN ORIGINAL PACKAGES. — Though it is a well-settled general rule of equity jurisprudence that a court of equity never extends its jurisdiction to the enjoining of criminal proceedings, yet the rule has its exceptions. One of these is, where a threatened criminal proceeding is vexatious and involves a destruction or injury to property; and, especially, under circumstances where the party injured would have no adequate remedy at law for restitution. On this ground the federal courts will issue injunctions, against proceedings by a State attorney, to prevent the enforcement by him of State laws prohibiting the sale of intoxicating liquors in the original packages in which they were imported, in violation of the interstate commerce clause of the federal constitution. That such a proceeding is not a suit against a State within the 11th Amend. of U. S. Const., see *Tuckman v. Welch*, 42 Fed. Rep. 548. *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 561.

EVIDENCE — HEARSAY. — In ejectment against deceased's widow, she may introduce deceased's declaration that he had bought the land, not with a view to set up his title, but for the purpose of showing that his possession was adverse under the Statute of Limitations or otherwise. *Mississippi County v. Vowles*, 14 S. W. Rep. 282 (Mo.).

EXECUTORS AND ADMINISTRATORS — REIMBURSEMENT FROM LEGATEES AFTER DISTRIBUTION. — An executor handed over to K. the certificates for certain shares of stock not fully paid up, but no transfer was executed. After the estate was completely settled, the executor was compelled to pay calls on the stock standing in his name. *Held*, that the executor could recover from K. the amount paid. Notice of a debt prevents the executor from recovering under these circumstances; but knowledge that, since the shares were only partly paid up, a call might sometime in the future be made, was notice, not of a debt, but of a liability. *In re Kershaw*, 63 L. T. Rep. N. s. 203 (Eng.).

This case goes farther than *Jervis v. Wolferstan*, L. R. 18 Eq. 18, which it

professes to follow. In the earlier case the executors would be called on only in case the company failed, a "remote, contingent, unexpected liability." This fact is emphasized in the opinion. The present case lays down the clear rule that "notice of a liability is not sufficient to deprive the executors of their right to recover. It must be notice of a debt."

INSOLVENCY — PROCEEDINGS BY ASSIGNEE. — A Massachusetts creditor, knowing that his debtor was in fact insolvent, sold his claim to a citizen of another State before the debtor was adjudged insolvent, to enable the purchaser to maintain an action on the claim in another State after the debtor was declared insolvent. The creditor agreed to pay the costs of collection and also any deficit, if the full amount of the claim should not be recovered. *Held*, that the assignee in bankruptcy of the debtor could not recover from the creditor the amount obtained from his claim, as the statutes give no such remedy; nor can the defendant be enjoined from prosecuting the action in another State, for the buyer of the claim has obtained the right to prosecute it for his own benefit. Whether the creditor could be prevented from proving his other claims against the insolvent was not decided. *Procter v. Bank of the Republic*, 25 N. E. Rep. 81 (Mass.).

MASTER AND SERVANT — WHO IS AN EMPLOYEE. — The plaintiff, a switchman for defendant company, "off duty," boarded one of its trains of his own accord, and was ordered by the conductor to turn a switch, in the performance of which act he sustained injury. *Held*, that the conductor had no implied authority to give such a command, and the mere act of obeying it did not constitute plaintiff the defendant's employee so as to bar his action. *McDaniel v. Highland Ave. and B. R. Co.*, 8 So. Rep. 41 (Ala.).

MUNICIPAL CORPORATIONS — LETTING OF CONTRACTS. — The charter of Long Island City provides that all contracts shall be let to "the lowest responsible bidder giving adequate security." *Held*, that a *mandamus* will not be granted to compel the mayor to pay a bill audited by the council for work done under a contract awarded to a higher bidder when there was no showing that the lower bidder was not responsible, nor his security inadequate. Under such circumstances the letting of the contract to a higher bidder is not a judicial determination binding on the courts. *People ex rel. Coughlin v. Gleason*, 25 N. E. Rep. 4 (N. Y.).

REAL PROPERTY — COVENANT RUNNING WITH THE LAND — EQUITABLE EASEMENT. — A., a brewer and also a dealer in beer, carrying on business at the X. brewery, by indenture leased a public house to the defendant. The defendant covenanted with his lessor, heirs, executors, administrators, and assigns, not to buy or dispose of on the premises any beer other than that purchased of the lessor, etc., provided the lessor, etc., sell such liquors, and are willing to supply the same of good quality and at the market rate. A. sold and assigned his brewery and good-will to B., a brewer carrying on business at the Y. brewery, and assigned to him the public house and the benefit of the above covenant. *Held*, (1) upon construction of the covenant, that the benefit of it was not restricted to assigns carrying on the same brewer's business as the lessors; (2) that the covenant was not personal and incapable of assignment, but a covenant relating to the way in which the business at a particular house was to be carried on, hence it touched and concerned the land, and ran with it; (3) that, whether running with the land or not, the plaintiff could enforce the covenant in equity as assignee of the benefit of it. *Clegg v. Hands*, 44 Ch. Div. 503 (Eng.).

REAL PROPERTY — EASEMENT OF ABUTTERS IN HIGHWAYS — STREET RAILWAYS. — A steam railroad which lays its tracks on the surface of a street with the permission of the city is not liable to an abutting owner who does not own the fee of the street for damages resulting from a reasonable use of its rights. The case contains a careful review of the New York authorities, and distinguishes the elevated railroad cases, on the ground that in them the structure was a permanent obstruction of the streets. *Forbes v. R. Co.*, 24 N. E. Rep. 919 (N. Y.).

REAL PROPERTY — FRAUDULENT CONVEYANCES. — The defendant paid for and took possession of land, but the conveyance was in the name of the plaintiff to defraud the defendant's creditors. The plaintiff brought an action of ejectment; and it was held that the defendant could show these facts and the plaintiff could not recover. *Kirkpatrick v. Clark*, 24 N. E. Rep. 71 (Ill.).

The authorities differ widely on this subject. It is believed that there is only one case in the country directly in point, and that agrees with the above case, — *Harrison*

v. *Hatcher*, 44 Ga. 638; but see *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367, *contra*. The result is extremely unsatisfactory, for it leaves the plaintiff the legal owner of the land, and if he can in any way get in possession he can keep it.

It was held in *Nellis v. Clark*, 20 Wend. 24, and *Dyer v. Homer*, 22 Pick. 253, where a note was given in payment for a fraudulent transfer of property and the consideration had failed, that the note could not be enforced. The ground of decision in both cases is that when it appears by the evidence of either party that the transaction was fraudulent, the court will leave the parties just as it found them. But the rule works much more satisfactorily in the note cases, for in them the whole affair is settled and not left in the air.

The rule adopted in other jurisdictions is that no one shall be allowed to set up his own fraud to maintain a claim or a defense, and accordingly it was held in *Brookover v. Hurst*, 1 Met. (Ky.) 665, and *Bonesteel v. Sullivan*, 104 Pa. St. 9, that a mortgage note given in fraud of creditors would be enforced. See also *Philpotts v. Philpotts*, 10 C. B. 85. It is evident that the application of this rule would have led to a much better result in the principal case.

REAL PROPERTY — TRANSFER OF MORTGAGED LAND. — The defendant, by a deed conveying land to him, became bound to the grantor to pay the two mortgages on it. He failed to pay the first note, so the mortgage was foreclosed, and the claim satisfied out of the land. Held, that the grantor could recover the amount of the debt secured by the second mortgage immediately. By his contract the defendant was bound not only to relieve the grantor from personal liability, but to discharge the lien of the mortgage; and by his failure so to do the grantor was left without any security for the second mortgage. Field, Devens, and W. Allen, JJ., dissent. *Rice v. Sanders*, 24 N. E. Rep. 1079 (Mass.).

SALES — CONDITIONAL DELIVERY. — Goods were sold for cash on delivery, and payment was made by check. Held, that the vendor could retake the goods from an innocent sub-vendee on the dishonor of the check, since the payment and delivery were conditional, and the vendor was not "equitably estopped." *Nat. Bank of Commerce v. C. B. & N. R. R. Co.*, 46 N. W. Rep. 342 (Minn.).

The court does not define "equitable estoppel," but it would seem that the decision is in direct conflict with the N. Y. doctrine as expressed by *Comer v. Conyngham*, 77 N. Y. 391. A concise statement of the authorities upon this point will be found in Benj. on Sales, 4th Am. ed. § 320, n. See also 15 Am. L. R. 381.

SALES — FACTOR'S ACT — DOCUMENT OF TITLE. — Held, that a receipt for whiskey stored in a bonded warehouse of the United States is not a document of title within the meaning of the Factors' Act of Kentucky, which provides that "any custom-house permit, warehouse receipt, etc., shall be deemed a document of title." The act cannot be understood to refer to bonded warehouses, as they are subject only to the regulation of Congress, and in the charge of officers of the United States. *George v. Fourth Nat. Bank*, 41 Fed. Rep. 257.

STATUTE OF FRAUDS — PAROL — PARTITION. — A parol partition of lands, made definite by marking a line on the ground, followed by occupancy in pursuance thereof, is sufficient to rest title. *McKnight v. Bell*, 19 Atl. Rep. 1036 (Pa.).

This case settles the Pennsylvania law in accordance with a much earlier decision (1 Bin. 216), and finally disperses the doubt occasioned by the case of *Gratz v. Gratz*, 4 Rawle, 411. The weight of authority is against this view.

TRADE-MARK — INJUNCTION. — An agent of the defendant, when asked by complainant's agent for a cake of "Sapolio," publicly delivered, without explanation, a scouring or sand soap known and stamped as "Pride of the Kitchen," of a different size and shape from "Sapolio," and contained in a wrapper of entirely different appearance. Held, that this was, in effect, an assertion that the cake delivered was "Sapolio," and an infringement of a trade-mark, the right of property in which belonged solely to the complainant. "It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good-will." See 32 Fed. Rep. 97, opinion by Mr. Justice Bradley. In such a case equity will issue an injunction to prevent the fraudulent use of the trade-mark of another. *Ensick Morgan's Sons Company v. Wendover et al.*, U. S. Cir. Court, District of New Jersey.

TRADE-MARKS — "UNION" LABELS. — A label adopted by a Cigar-Makers Union, to be pasted on boxes containing cigars made by its members, is not a

trade-mark, for it does not indicate by what persons the cigars were made, but merely that they were made by members of one of the local unions, and the right to use it depends entirely on such membership, and not on any reputation for skill in the manufacture of cigars. The use of imitations cannot be enjoined, therefore, on that ground; nor can it be prohibited on the ground that the imitations were calculated to make the public believe that the goods were the goods of another. Such an action has never been maintained except by one who was himself a manufacturer or dealer in the articles counterfeited. This action was brought by the members and officers of the "Union," and they cannot show any damage which is not too remote. *Weener v. Braxton*, 25 N. E. Rep. 46 (Mass.).

The few cases previously decided on this point are here carefully discussed.

TRUSTS — INSOLVENCY — PREFERRED CREDITORS. — The treasurer of the plaintiff corporation loaned money to the Globe Plow-Works Co. The treasurer had no power to make such a loan, and this fact was known to the Plow-Works Co. when it received the money. The Plow-Works Co. used the money, and afterwards made an assignment, for the benefit of creditors, to the defendant. *Held*, that the defendant held the money subject to the trust with which the treasurer of the plaintiff was charged, and that it would be deducted from the assets in the hands of the assignee before division was made among the creditors. *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. 1049 (Ia.).

TRUSTS — INVESTMENT OF TRUST FUNDS. — A trustee invested one-quarter of the trust fund in Union Pacific stock, at 119. Later, he bought nearly as much more at 123. *Held*, that as the road had been constructed at great expense through a new country, it was heavily indebted, and its continued prosperity depended on circumstances which could not be predicted, it was evident that the trustee took a considerable risk, and therefore, although he acted in perfectly good faith and under advice, he was not justified in putting so large a proportion of the fund into such stock, and should be charged with the amount of the second investment. *Appeal of Dickinson*, 25 N. E. Rep. 99 (Mass.).

WILLS — ATTESTATION. — A statute required wills to be attested "in the presence of" the testator. In this case the will was read over to the testatrix in the presence of the witnesses, and then at the wish of the testatrix the witnesses went into an adjoining room and signed it. The witnesses then returned with the will to the testatrix, and it was again read over to her, together with the names of the witnesses. She expressed her approval, and asked one of the witnesses if they (the witnesses present) had signed it, and was told that they had, and the signatures were shown to her. The room in which the witnesses signed was adjoining that of the testatrix, and the door was open, but it was impossible for the testatrix, from where she lay in bed, to see the act of signing. *Held*, that the statute had been complied with. *Cook v. Winchester*, 46 N. W. Rep. 106 (Mich.).

WILLS — CONSTRUCTION — PERPETUITIES. — An estate was devised to executors in trust to divide the net income equally among the three daughters of the testatrix, and at the end of ten years to distribute the principal among them in the same proportion. There were no words of survivorship and no provision for the death of a beneficiary. *Held*, that the estate vested in the daughters at the death of the testatrix, and so the devise was not in violation of the New York statute against perpetuities, which declares that the power of alienation shall not be suspended for more than two lives in being. Gray, J., concurred only in the result; Earl, Peckham, and O'Brien, JJ., dissent. *Hillyer v. Vandewater*, 24 N. E. Rep. 999 (N. Y.).

REVIEWS.

AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY. Being the Yorke Prize Essay of the University of Cambridge for 1889. By D. M. Kerly. University Press, Cambridge, 1890. 8vo. Pages xiv and 295.

In a prize essay, covering so vast a field as the jurisdiction of the Court

of Chancery from the time of Edward I. to the Judicature Acts, it would be obviously unreasonable to look for the merits of a monograph. Mr. Kerly has, nevertheless, given us a thoughtful and useful book. He presents, in a compact yet attractive form, the results of a careful study of nearly everything that has been written upon his subject. He seems not to have known, however, of Professor Langdell's treatise upon Equity Pleading, nor of that writer's remarkable essays upon Equity Jurisdiction in the HARVARD LAW REVIEW. That these writings should have escaped him is the more unfortunate, since the main defect of the book before us is due to the author's failure to seize and emphasize the fundamental distinction between law and equity; namely, that the common-law judges acted *in rem*, while the Chancellor always proceeded *in personam*, and that the common law was therefore essentially unmoral, whereas equity was essentially ethical.

We have noticed a few inaccuracies. On page 74 it is said that fraud could always be pleaded as a defence at law. But Lord Abinger in 1835, in *Mason v. Ditchbourne*, 1 M. & Rob. 460, and the Supreme Court of the United States in 1880, in *George v. Tate*, 102 U. S. 564, refused to admit that defence to an action on a bond, informing the defrauded obligor that his only relief was in equity. The distinction between a condition and a use is overlooked on pages 78, 81, and 84. The statement on page 86 that debt would not lie for chattels after the reign of Edward I. is contradicted by a long line of decisions.

The common-law judges have been so uniformly abused for their narrow construction of the Statute of Uses, in refusing, as in *Tyrrell's Case*, to allow the statute to execute a use upon a use, and the chancellors have been so uniformly commended for promptly remedying the mischief of that common-law decision, that our author is hardly to be criticised for repeating, on page 135, these inveterate opinions. But they are none the less inveterate errors. It was a chancery doctrine before the Statute of Uses that there could be no use upon a use, and for the reason, quite in keeping with the spirit of the age, that the second use, being repugnant to the first, was necessarily void. The common-law judges, therefore, could not do otherwise than decide that the statute had no operation upon the void use. Furthermore, the modern doctrine, that the second use may be supported as a trust, is believed to have originated in *Sambach v. Dalton*, Tothill, 188, decided in 1634, a century after the Statute of Uses.

J. B. A.

THE TRANSFER OF NEGOTIABLE PAPER AS COLLATERAL SECURITY. By Lewis Lawrence Smith. Philadelphia, 1890: T. & J. W. Johnson & Co. 8vo. Pages 39.

This is the Sharswood Prize Essay of the University of Pennsylvania for 1886. The essay is upon one point, viz., whether a creditor who takes negotiable paper as security for a previous debt, is safe from prior equities. The author favors the view of the English and United States Supreme Courts, that the creditor is safe, because his forbearance is a sufficient consideration. The essay is an attempt to show an actual common-law consideration from the creditor, rather than an argument from the standpoint that a bill or note is a commercial specialty.

D. T. D.

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THE RIGHT TO PRIVACY.

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."

WILLIS, J., in *Millar v. Taylor*, 4 Burr. 2303, 2322.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

fear of such injury. From the action of battery grew that of assault.¹ Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.² So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.³ Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.⁴ Occasionally the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.⁵ Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,⁶

¹ Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

² These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

³ Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

⁴ Winsmore v. Greenbank, Wiles, 577 (1745).

⁵ Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages," Cassoday, J., in Lavery v. Crooke, 52 Wls. 612, 623 (1881). First the fiction of constructive service was invented; Martin v. Payne, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. Bedford v. McKowl, 3 Esp. 119 (1800); Andrews v. Askey, 8 C. & P. 7 (1837); Phillips v. Hoyle, 4 Gray, 568 (1855); Phelin v. Kenderdine, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, e. g., the suffering of the parent in case of physical injury to the child. Flemington v. Smithers, 2 C. & P. 292 (1827); Black v. Carrollton R. R. Co., 10 La. Ann. 33 (1855); Covington Street Ry. Co. v. Packer, 9 Bush, 455 (1872).

⁶ "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in Jefferys v. Boosey, 4 H. L. C. 815, 869 (1854).

as works of literature and art,¹ goodwill,² trade secrets, and trademarks.³

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."⁴ Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons;⁵ and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.⁶ The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago,⁷ directly involved the consideration

¹ Copyright appears to have been first recognized as a species of private property in England in 1558. *Drone on Copyright*, 54, 61.

² *Gibblett v. Read*, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property.

³ *Hogg v. Kirby*, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. *Blanchard v. Hill*, 2 Atk. 484.

⁴ *Cooley on Torts*, 2d ed., p. 29.

⁵ 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

⁶ *Scribner's Magazine*, July, 1890. "The Rights of the Citizen: To his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

⁷ *Marion Manola v. Stevens & Myers*, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

of the right of circulating portraits ; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual ; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury ;¹

¹ Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages ; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum frexit*. *Wvman v. Leavitt*, 71 Me. 227; *Canning v. Williamstown*, 1 *Cush.* 451. The allowance of damages for injury to the parents'

but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.¹

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.² Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular

feelings, in case of seduction, abduction of a child (*Stowe v. Heywood*, 7 All. 118), or removal of the corpse of child from a burial-ground (*Meagher v. Driscoll*, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

¹ "Injuria, in the narrower sense, is every intentional and illegal violation of honour, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, *Roman Law*, p. 668 and p. 669, n. 2.

² "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769).

method of expression adopted. It is immaterial whether it be by word¹ or by signs,² in painting,³ by sculpture, or in music.⁴ Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.⁵ The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.⁶ No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words,

¹ Nicols *v.* Pitman, 26 Ch. D. 374 (1884).

² Lee *v.* Simpson, 3 C. B. 871, 881; Daly *v.* Palmer, 6 Blatchf. 256.

³ Turner *v.* Robinson, 10 Ir. Ch. 121; s. c. ib. 510.

⁴ *Drone on Copyright*, 102.

⁵ "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive,—rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695 (1849).

⁶ "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 694.

publishes it.¹ It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication ; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.² The statutory right is of no value, *unless* there is a publication ; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art ? It is stated to be the enforcement of a right of property ;³ and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property : they are transferable ; they have a value ; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptation

¹ Duke of Queensberry *v.* Shebbeare, 2 Eden, 329 (1758); Bartlett *v.* Crittenden, 5 McLean, 32, 41 (1849).

² Drone on Copyright, pp. 102, 104; Parton *v.* Prang, 3 Clifford, 537, 548 (1872); Jefferys *v.* Boosey, 4 H. L. C. 815, 867, 962 (1854).

³ "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court." Lord Eldon in Gee *v.* Pritchard, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in Prince Albert *v.* Strange, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in Woolsey, *v.* Judd, 4 Duer, 379, 384 (1855).

of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully ; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry ; the restraint extends also to a publication of the contents. What is the thing which is protected ? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures ; but it would not prevent a publication of a list or even a description of them.¹ Yet in the famous case of

¹ "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

" Suppose, however,— instead of a translation, an abridgment, or a review,— the case of a catalogue,— suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published,— suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

" By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

" Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 De Gex & Sm. 652, 693.

Prince Albert v. Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."¹ Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.²

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly

¹ "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in *Prince Albert v. Strange*, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in *Millar v. Taylor*, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion,—an unbecoming and unseemly intrusion,—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man,—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696, 697.

² *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 194 (1876).

when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.¹

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published."² But

¹ "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another,—may be not only an ideal calamity, — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 689, 690.

² *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 324 (1848); *Wetmore v. Scovell*, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

these decisions have not been followed,¹ and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of *Prince Albert v. Strange*, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which

¹ *Woolsey v. Judd*, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in *Gee v. Pritchard*, 2 Swanst. 402, 418 (1818). But see *Hugh on Injunctions*, 3d ed., § 1012, *contra*.

is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed—and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.¹

¹ "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the

judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in Bartlett v. Crittenden, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. Eyre v. Higbee, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived — *proprius* — is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.¹ This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book ; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered at St. Batholomew's Hospital in London, Lord Eldon

¹ "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." *Knight Bruce*, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696.

doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In *Prince Albert v. Strange*, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In *Tuck v. Priester*, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the

photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property,¹ in order to

¹ "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in *Tuck v. Priester*, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." North, J., in *Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of pro-

bring it within the line of those cases which were relied upon as precedents.¹

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special

tection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison v. Moat* [9 Hare, 241] and *Tuck v. Priester* [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., *ibid.* p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

¹ *Duke of Queensberry v. Shebbeare*, 2 *Eden*, 329; *Murray v. Heath*, 1 *B. & Ad.* 804; *Tuck v. Priester*, 19 *Q. B. D.* 629.

confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.¹ Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptation of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading

¹See Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, 111 (1841): —

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

the letter, have come under any obligation save what the law declares ; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.¹

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.² It would, of course, rarely happen that any one would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass,—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in *Yovatt v. Winyard*, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.³

¹ "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in *Grigsby v. Breckenridge*, 2 Bush. 480, 489 (1867).

² In *Morison v. M^{at}t*, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

³ A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill," but it was not until 1743 that goodwill received

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world ; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.¹

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension ; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant state-

legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3.

¹ The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

" I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

ments in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.¹

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

I. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.² There are of course difficulties in applying such a rule, but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may

¹ Loi Relative à la Presse. 11 Mai 1868.

"11. Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d'un amende de cinq cent francs.

"La poursuite ne pourra être exercée que sur la plainte de la partie intéressée."

Riviére, Codes Francais et Lois Usuelles. App. Code Pen., p. 20.

² See *Campbell v. Spottiswoode*, 3 B. & S. 769, 776; *Henwood v. Harrison*, L. R.

7 C. P. 606; *Gott v. Pulsifer*, 122 Mass. 235.

properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.¹ Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case,—a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to

¹ " Nos moeurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du public, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le théâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui reprennent la diffamation et l'injure." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.¹

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed

¹ "Celui-là seul a droit au silence absolu qui n'a pas expressément ou indirectement provoqué ou autorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "silence *absolu*" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

for almost every purpose of benevolence, business, or other general interest ; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.¹ Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.²

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.³ The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.⁴

¹ *Wason v. Walters*, L. R. 4 Q. B. 73 ; *Smith v. Higgins*, 16 Gray, 251 ; *Barrows v. Bell*, 7 Gray, 331.

² This limitation upon the right to prevent the publication of private letters was recognized early : —

"But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them ; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach." *Story, J.*, in *Folsom v. Marsh*, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does not seem satisfactory. *Drone on Copyright*, pp. 136-139.

³ *Townshend on Slander and Libel*, 4th ed., § 18 ; *Odgers on Libel and Slander*, 2d ed., p. 3.

⁴ "But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossipped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it." E. L. Godkin, "The Rights of the Citizen : To his Reputation." *Scribner's Magazine*, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.¹

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth of falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.²

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, *e. g.*, that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong

¹ See *Drone on Copyright*, pp. 121, 289, 290.

² Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." *Circ. Mins. Just., 4 Juin, 1868. Rivière Code Français et Lois Usuelles, App. Code Penn.* 20 n(a).

to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely :—

1. An action of tort for damages in all cases.¹ Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.²

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.³ Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits ; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of

¹ Comp. Drone on Copyright, p. 107.

² Comp. High on Injunctions, 3d ed., § 1015; Townshend on Libel and Slander, 4th ed., §§ 417a-417d.

³ The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation :—

“ SECTION I. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars ; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

“ SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention ; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged.”

the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

*Samuel D. Warren,
Louis D. Brandeis.*

BOSTON, December, 1890.

THE POLICE POWER AND INTER-STATE COMMERCE.

THE attention of the public has recently been attracted to the question of the relation of the police power to inter-state commerce by the so-called "original package" decision rendered by the Supreme Court of the United States in April last.¹ The majority of the Court there decided that a State law prohibiting the sale of intoxicating liquors, except for specified purposes, is void as to liquors imported from another State and sold by the importer in the original package. Two points of law are comprehended in this decision:—

1. An article imported from another State is within the domain of inter-state commerce until the original package is broken or sold by the importer.
2. Prohibitory liquor legislation is void so far as it applies to articles within the domain of inter-state commerce.

The first point involved, although never before adjudicated, falls within the principle of *Brown v. Maryland*,² where a similar decision was made as to the duration of foreign commerce. The application of that principle to inter-state commerce has been expected, and needs no comment here. The second point decided imposes an unexpected limitation upon the exercise of the State police power, and the matter deserves a careful examination.

The decision has not ceased to be of practical importance by reason of the recent legislation by Congress upon the subject,³ for two reasons: first, it is held that the act is not retroactive, and gives no validity to legislation upon the statute books of the several

¹ *Leisy v. Hardin*, 135 U. S. 100.

² 12 Wheat. 419.

³ "All fermented, distilled, or other intoxicating liquors or liquids, transported into any State or Territory for use, consumption, sale, or storage, shall, on arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

States at the time the act was passed;¹ secondly, the act applies to intoxicating liquors only, leaving the case unaffected as an authority so far as its principle applies to other articles of inter-state commerce. It may be added further that the constitutionality of the act is not unquestioned.²

The most important power possessed by a government is the power to protect its citizens from danger, disease, and vice. This power we call the police power, and not being delegated to Congress by the Constitution, is reserved to the States exclusively.³ The police power has sometimes been defined in terms so broad as to include nearly all the legislative powers of a State; but the power to make regulations for the benefit of commerce, or to promote the public convenience, is distinct from the power to preserve and protect the public health, morals, and safety. Properly used, the term "police power" applies only to the latter portion of the sovereign powers of a State.⁴ That the use of intoxicating liquors may cause pauperism, disease, and crime is common knowledge. Legislation designed to regulate and prohibit the sale of intoxicating liquors, so far as the internal commerce of a State is concerned, has frequently been upheld by the United States Supreme Court as a valid exercise of the police power.⁵

The question presented in *Leisy v. Hardin*, and in *Bowman v. Chicago & N. W. Railway Co.*,⁶ on which the court in the former case greatly rely, is, whether a State can make police regulations concerning articles of inter-state commerce, when such regulations amount to a prohibition of traffic in such articles. It was decided in the negative, on the ground that it would conflict with the commercial powers of Congress.

Congress derives its powers over inter-state commerce from that clause in the Constitution which gives it "power . . . to regulate commerce with foreign nations and among the several States." If Congress has made any regulations of inter-state commerce, any conflicting State legislation is invalid, although made in pursuance of an acknowledged power of the State. The power of Congress within its domain must be supreme. In the absence

¹ *In re Rahrer*, 43 Fed. Rep. 556.

² See 41 Alb. L. J. 473; 31 Cent. L. J. 50, 227.

³ *United States v. Dewitt*, 9 Wall. 41. ⁴ See 3 Harv. Law Rev. 193 *et seq.*

⁵ *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1.

⁶ 125 U. S. 465.

of congressional legislation, the State has power to act unless Congress has been given exclusive power over the subject.

The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character, and admits of and requires a uniform rule. Accordingly, it is held, for example, that a State cannot regulate the rates of transportation on goods destined to another State,¹ impose a tax on goods which are being transported into or through the State,² or prescribe the accommodations to be furnished passengers coming into or going out of the State.³ Two tests, then, are to be applied to determine the validity of State legislation: (1) Does Congress have exclusive power over the subject-matter? (2) Does the law conflict with any act of Congress?

In *Leisy v. Hardin* and *Bowman v. Chicago & N. W. Railway Co.* it was not claimed that there was any conflicting act of Congress. It was the first test named above which the majority of the court thought the legislation before them failed to meet. In *Leisy v. Hardin* the court do say, "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of inter-state commerce are not such."⁴ This statement, however, was not made to show a conflict between the State law and any congressional legislation. At the time of this decision the only legislation by Congress upon the subject of intoxicating liquors was to be found in the internal revenue laws. These laws were not passed to regulate commerce, but merely to tax certain articles when and where they were manufactured and dealt in, which is very far from a declaration that they should be dealt in and be subjects of commerce between the States. Attention was called to these acts of Congress in order to emphasize the undoubted fact that intoxicating liquors are articles of commerce. The decision proceeds upon the ground, and the whole opinion is devoted to showing, that the police power of the State does not extend to inter-state commerce, at least to the extent of prohibition.

¹ *Wabash, etc., Railway Co. v. Illinois*, 118 U. S. 557.

² *State Freight Tax*, 15 Wall. 232.

³ *Hall v. De Cuir*, 95 U. S. 485.

⁴ 135 U. S. 100, 125.

The *ratio decidendi* of *Leisy v. Hardin* appears to be substantially this: The transportation of goods from one State to another is national in character, and requires a uniform rule. Congress, therefore, has exclusive power to regulate it. If Congress makes no regulations, it indicates its will that such commerce shall be free and unrestricted. The legislation in question is a regulation which does restrict it, and is, therefore, void.

If by "free and unrestricted" the court mean anything more than freedom from such commercial regulations as require a uniform rule affecting alike all the States, the inference is entirely unjustifiable, for it is only to this extent that Congress has exclusive jurisdiction over inter-state commerce. If Congress fails to act, all that is indicated is that it considers that there is no necessity for exercising its exclusive jurisdiction,—that is, making such regulations of commerce as should have a uniform rule in all the States. Certainly it cannot be inferred, from the mere inaction of Congress, that that body has thereby expressed its will that a State shall not exercise its police power upon inter-state commerce, where the exercise of it does not involve the exercise of powers given exclusively to Congress. The question to be determined, then, in each case, is, whether the regulation is of a nature where there should be uniformity in all the States.¹

Police regulations do not require a uniform rule for all communities. The dangers to the health, safety, and morals of their citizens differ in nature and importance in the different States, and police regulations in each State should be adapted to the education and habits of its citizens. In one place one kind of regulation may be effective, in another place some other regulation is required, and in some communities prohibitory regulations are considered the only effective ones. Accordingly, the power to make police regulations was not delegated to Congress, but was reserved to the States respectively.² Furthermore, the power to regulate inter-state commerce was given to Congress for commercial reasons, and the States cannot be supposed to have intended to deprive themselves of so important a power as its police power, except so far as is necessary to enable Congress to properly exercise its power over inter-state commerce. As the mi-

¹ See *Bowman v. Chicago & N. W. Railway Co.*, 125 U. S. 465, 482-483, per Matthews, J.

² *United States v. Dewitt*, 9 Wall. 41.

nority of the court, in *Leisy v. Hardin*, well say, "An intention is not lightly to be imputed to the framers of the Constitution or to the Congress of the United States to subordinate the protection of the safety, health, and morals of the people to the promotion of trade."¹

Whether Congress, while having no power to make police regulations, can, under its power to regulate inter-state commerce, make regulations designed to secure the safety and morals of the citizens of the United States, — regulations, for example, as to the manner in which arsenic and gunpowder are sold in the original package, or the hours or places in which the intoxicating liquors in the original package may be sold, is, to say the least, of doubtful constitutionality. It is certainly inexpedient from a practical point of view. It is much more important that this class of regulations should be in accordance with the regulations affecting the internal commerce of a State, concerning which Congress has no power, than that there should be a uniform rule in all the States. The practical difficulties which would otherwise arise are apparent to any one. If in any store there is one rule as to the sale of articles in the original package, and another as to articles manufactured within the State, or where the package is broken, confusion would be the inevitable result, and it would be next to impossible to enforce either law. Congress has not attempted to make any uniform regulations, and it is generally conceded that a State may to a certain extent regulate inter-state commerce to protect itself and its citizens from injury.

"Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality unfit for human use or consumption."² The somewhat fanciful reason is given that "such articles are not merchantable; they are not legitimate subjects of trade or commerce," and "may be rightly outlawed." This cannot be the true reason why regulations by the State concerning the importation of such articles are not inconsistent with the commercial powers of Congress, for, if it were, it would

¹ 135 U. S. 100, 158. ² *Bowman v. Chicago & N. W. Railway Co.*, 125 U. S. 465, 489.

follow that any regulations of commerce made by Congress would not apply to such articles. The true reason is, that the regulations are made in exercise of the police power, and do not conflict with any congressional legislation.

In *Leisy v. Hardin* the court say, as to articles of inter-state commerce, that "if directly dangerous in themselves the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."¹ Whether the court intended to include in this class, articles other than those "unfit for human use," is not clear, but other judges have not confined the police power of the State to such articles. Poisons and explosives are articles the use of which needs to be carefully regulated. "Arsenic, dynamite powder, and nitro-glycerine are imported into every State under such restrictions as to their transportation and sale as to render it safe to deal in them."² The right of a State to regulate the transportation of nitro-glycerine has been expressly recognized by Congress.³ So, also, it has been held that a State may require all locomotive engineers in the State, although engaged in inter-state commerce, to be examined, and may prevent them from operating a locomotive unless duly licensed by the examining board.⁴ "It is conceded that the power of Congress to regulate inter-state commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts that wherever there is any business in which, either from the products created or in the instrumentalities used, there is danger to life and property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."⁵

¹ 135 U. S. 100, 125.

² *Bowman v. Chicago & N. W. Railway Co.*, 125 U. S. 465, 504, per Field, J.

³ Rev. Stats., § 4280.

⁴ *Smith v. Alabama*, 124 U. S. 465; *Nashville, etc. Railway Co. v. Alabama*, 128 U. S. 96.

⁵ *Nashville, etc. Railway Co. v. Alabama*, 128 U. S. 96, 99.

If, then, the police power extends to inter-state commerce, if the State, for the purpose of protecting the health and safety of its citizens, may regulate inter-state commerce to some extent, why may not its regulations extend to the prohibition of traffic in any articles, if such traffic is honestly believed to be dangerous to the community? The State prohibits merely because it deems that to be the most effective way of removing the evil in that community. A prohibition of traffic in any article is, indeed, in effect a declaration that such article shall not be an article of commerce. It is also true that the power of Congress to regulate commerce between the States must include the right to determine what shall be the subjects of such commerce. Otherwise, "the power to regulate commerce would become subordinate to the State police power."¹ Therefore, if Congress had prescribed that a certain article should be an article of inter-state commerce, or forbidden restrictions on its importation, a State could not prohibit its introduction within its limits and its sale in the original package. But until Congress has acted we have the same question as before: Is the regulation one that it is proper should be alike for all the States? And we are met with the same answer: Police regulations must be adapted to the communities where they have effect, and a country so large as this, and whose inhabitants differ so in characteristics in different sections, should not have one set of police regulations for the whole country. This is especially so, since any regulations made by Congress could have no application to the internal commerce of a State.

The conclusion reached by the court in the two cases under consideration does not appear to be tenable. The opinion in *Bowman v. Chicago & N. W. Railway Co.* appears to rest largely on a misconception of the police power. "Can it be supposed," says Mr. Justice Matthews, "that by omitting any express declarations on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the inter-state commerce of the country? If so, it has left to each State, according to its caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of in-

¹ *License Cases*, 5 How. 504, 600, per Catron, J.

toxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the peace, comfort, or health of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufacture, or arts of any description, and prevent the introduction or sale within its limits of any or of all articles that it may select as coming into competition with those it seeks to protect. The police power of the State would extend to such cases as well as to those in which it sought to legislate in behalf of the health, peace, and morals of the people."¹ From which reasoning the conclusion is apparently drawn that the police power does not apply to inter-state commerce at all. With all due respect, however, to Mr. Justice Matthews, the police power would not extend to the cases named. The police power, properly so called, extends only to the protection of the health, morals, and safety of the people, and it seems perfectly reasonable to suppose that Congress by failing to act has intentionally left to each State to exclude any article which it may fairly deem inimical to the health, morals, and safety of its citizens. If a State does not act fairly, or, if ostensibly acting under its police power, its legislation discriminates against the citizens of other States, or affects objects and persons not within the scope of its purpose, there is ample authority to show that such acts are invalid, and not a legitimate exercise of the police power.²

In *Leisy v. Hardin*, the court, although relying greatly on *Bowman v. Chicago & N. W. Railway*, apparently do not misconceive in this way the extent of the police power of a State; but their opinion, at its very beginning, contains this proposition: "A subject-matter which has been confided exclusively to Congress by the Constitution [referring, as the context shows, to inter-state commerce], is not within the jurisdiction of the police power of the State unless placed there by congressional action."³ No reasons are given other than those alluded to above, but the court cite, in support of this proposition, four cases, which it is desirable to examine.

¹ 125 U. S. 465, 493.

² *Henderson v. Mayor of New York*, *infra*; *Walling v. Michigan*, *infra*.

³ 135 U. S. 100, 108.

1. *Henderson v. The Mayor of New York*¹ was a case where the State law before the court imposed in effect a tax of a dollar and a half upon every immigrant landing at the port of New York. The State sought to defend this act as an exercise of its police power, claiming that its purpose was protection against pauper immigrants. The court held, however, that as the burden fell alike on all immigrants, without regard to their condition, it went beyond its professed purpose, and was not a valid exercise of the police power. What the powers of the State in the premises were, was expressly left open. "Whether in the absence of such action [by Congress] the States can, or how far they can, by appropriate legislation protect themselves against paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign sources, we do not decide." ²

2. In *Railroad Co. v. Husen*,³ the law in question prohibited the introduction into the State during eight months of each year of any Texan, Mexican, or Indian cattle. This was defended on the ground that it was designed to keep diseased cattle out of the State ; but the court held that as the law applied to sound cattle as well as to diseased cattle, it went beyond the necessity of the case, and the act was therefore void. So far from denying that the police powers of the State may be applied to inter-state commerce, the court expressly admit that to be the law. "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders ; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State ; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection." ⁴ Referring to the case of *Henderson v. Mayor of New York* and *Chy Lung v. Freeman*,⁵ decided at the same time, the court say, "Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it is held that the right could only arise from vital necessity. . . . They deny validity to any State legislation professing to be an exercise of

¹ 92 U. S. 259.

³ 95 U. S. 465

² Ibid. 275.

⁴ Ibid. 472.

⁵ 92 U. S. 275.

police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government."¹

3. The third case is *Walling v. Michigan*,² which is also cited in *Bowman v. Chicago & N. W. Railway Co.*, as a case by which "the present case is concluded." This case turned upon the validity of a statute of the State of Michigan, which imposed a tax upon all persons engaged in the sale of intoxicating liquors, imposing a heavier burden upon the agents of non-resident dealers than it did upon those of resident dealers. The court held, that inasmuch as the tax operated to the disadvantage of the products of other States, it was in effect a regulation of commerce between the States, and the statute was therefore void. Replying to the suggestion that the tax was "an exercise of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people," the court say, "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national Legislature."³ The case is decided solely upon the ground of discrimination, and the judgment was in no way conclusive upon the court in a case like *Bowman v. Chicago & N. W. Railway Co.*, where there was no discrimination. The court, in the latter case, note the difference in the two cases, and say,⁴ "It would be error to lay any stress on the fact that the statute passed upon in that case [*Walling v. Michigan*] made a discrimination between the citizens and products of other States in favor of those of the State of Michigan. . . . This appears plainly from what was decided in the case of *Robbins v. Shelby Taxing District*," which is the fourth case relied upon in *Leisy v. Hardin*.

4. In *Robbins v. Shelby Taxing District*⁵ the question of police power was not involved at all. The statute there declared to be void was one requiring all drummers, not having a licensed place of business within the Shelby Taxing District, and offering for sale or selling goods by sample, to be licensed and pay a fee therefor. The question discussed was whether the license tax was upon the occupation or upon commerce; and the court held that in effect it was a tax upon commerce, and a regulation of commerce, and

¹ 95 U. S. 465, 473.

² 116 U. S. 446.

³ Ibid. 460.

⁴ 125 U. S. 465, 496.

⁵ 120 U. S. 489.

therefore void ; and that it was none the less a regulation of inter-state commerce because it regulated the internal commerce of the State in the same way. There was no pretence that the business of the plaintiff in error — selling stationery, etc., by sample — was inimical to the health or safety of the State, or that the law was passed in the exercise of the police power. This case covers an entirely different ground from *Walling v. Michigan*, and does not in any way impeach or modify that case.

None of these cases, therefore, sustain the proposition that inter-state commerce is not within the jurisdiction of the police power of a State. Indeed, there is no authority for such a doctrine, unless it be found in *Leisy v. Hardin*.

Notwithstanding the language used by the court in *Leisy v. Hardin*, it is not at all certain that they intended to decide the case on the ground that the police power of a State does not include inter-state commerce within its jurisdiction. The law in question prohibited traffic, which is somewhat different from regulating it ; and it may be that the court thought that such a law was more a commercial regulation than a police regulation. The following language seems to bear this interpretation : “ Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which in this particular has been exclusively vested in the general government, and is, therefore, void.”¹ “ To concede to a State the power to exclude, directly or indirectly, articles [of inter-state commerce] without congressional permission, is to concede to a majority of the people of a State represented in the State Legislature the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress.”² In *Bowman v. Chicago & N. W. Railway Co.*, Mr. Justice Field puts his concurring opinion expressly upon this ground. After noticing that the police power can be applied to inter-state commerce, referring to *Mugler v. Kansas*,³ where a State law prohibiting the manufacture of intoxicating liquors within the limits of the State

¹ 135 U. S. 100, 123.

² Ibid. 125.

³ 123 U. S. 623.

was held to be a valid exercise of the police power, he says : "The decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the State over property created within it and its power over property imported — its power in one case extending for the protection of the health, morals, and safety of its people to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the State. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled."¹

The distinction is, indeed, open to criticism, for the difference between prohibition and regulation is one of degree, not of kind. Whether the law amounts to a prohibition or not, it affects commerce in some degree, but being designed to secure the public health and safety, it is in either case a police regulation ; and, therefore, as has been previously shown, even in the case of inter-state commerce it is a proper case for a State to act, so far as its legislation does not conflict with any act of Congress.

The decision in *Leisy v. Hardin* and *Bowman v. Chicago & N. W. Railway Co.* must be considered erroneous ; but if they are to stand, they will undoubtedly be sustained on the ground stated by Mr. Justice Field, rather than on the ground that the police power does not apply to inter-state commerce. It is hardly possible to believe that the court would have decided that a mere regulation by a State of the sale of intoxicating liquors — for example, forbidding sales to minors, or to adults between eleven o'clock in the evening and six o'clock in the morning — would not be valid as applied to sales of liquor in the original package. But it is to be hoped that these decisions are not final, and that the opinion of the minority of the court will ultimately be adopted.

Undoubtedly it is oftentimes difficult to draw the line between State and National powers ; but the line should be drawn so far as possible, so as to give full play to the powers of each. In these decisions the line is not so drawn. Concerning a portion of the property and transactions within its borders, a State may not legislate as it desires, in order to protect the health and morals of its citizens ; and the exercise of its police power over other property

¹ 125 U. S. 465, 506.

and transactions is rendered ineffective. The police regulation that the State makes, may not conflict with any national regulation, and cannot interfere with the making of any ; it may be a perfectly reasonable provision to prevent disease and crime ; but as to inter-state commerce it may, under these decisions, be invalid. That such a consequence should follow from merely giving Congress "power . . . to regulate commerce with foreign nations and among the several States," a provision made solely for the benefit of trade, is a result which it is hardly presumptuous to say the framers of the Constitution could never have intended.

William R. Howland.

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IN a recent case in a county court in Iowa, the question was raised between landlord and tenant as to the acquisition of rights of property in a meteorite. The tenant for years saw the meteorite fall, and immediately dug it up and sold it. It had already been decided by one of the lower courts of Iowa, in 1875, that a meteorite which fell on a highway belonged to the owner of the fee and not to the finder;¹ and in the case above mentioned the landlord prevailed. The tenant's vendee, however, was not satisfied with the decision, and we may hope soon to obtain the opinion of a court of last resort.

There was a case in England,² in 1839, where large stones had fallen upon copyhold land from an adjoining cliff. The copyholder removed and sold some of these stones, and the lord brought trover and obtained judgment on the ground that the stones had fallen before the copyholder came into possession, and were part of the soil granted to him. Parke, B., however, prefaced his opinion by saying: "If it had been shown that these stones had come from the adjoining hills by some convulsion of nature, or by the act of God, while the defendant was the copyholder, his argument would be well founded; then they would belong either to the party from whose lands they had been severed, or to the copyholder, as having fallen by accident upon his soil; and the lord would have no more right to them than in the case of an ordinary occupier of land under a landlord. But that question does not arise here. These stones have been in the same state as far back as living memory goes, and are to be considered a portion of the soil," etc.

It seems impossible to support this distinction. For if, as is assumed by Parke, B., in the case actually before him, the stones were a part of the soil when the tenant came into possession, must they not have been a part of the soil from the moment they fell and became embedded in it? From that moment they were physically annexed to the soil, and what more is necessary to make them a part of it? There cannot, as in the case of a fixture erected by the tenant, be any

¹ 15 Alb. L. J. 216.

² Dearden v. Evans, 5 M. & W. 11.

question as to the intention with which the annexation was made; for it was not made by human agency. If then by falling upon and becoming embedded in the land when there was no tenant there, they became a part of the soil, it is clear that the mere existence of a lease at the time of the fall can make no difference. For the physical annexation is the same whether there is a lease or not.

The question then is, has the tenant any right to sever; and it is submitted that he has not. Even when a fixture is erected by the tenant himself the general rule is that it becomes the absolute property of the landlord. To this rule there are, no doubt, many exceptions by which the tenant is given a right to sever; but in a case where he had no previous ownership in the thing annexed, it seems impossible to devise any reason whatever for departing from the general rule. A closer analogy, however, is found in the case of accretion,—an addition of land to land. For, though a meteorite is a mineral differing in crystalline structure from any mineral native to this earth, it is, in outward characteristics, like any other stone, and stones are in large measure the stuff that land is made of. A meteorite is, of course, a sudden addition to land, and true it is that sudden accretion to A.'s land from the sea, or by the sudden movement of a river, does not become the property of A.,—but no more does it become the property of A.'s tenant. The only reason, moreover, that it does not become A.'s property is that it had a former owner (either the king or a private individual), and can be identified. As to the question between landlord and tenant, therefore, the case of the meteorite and the case of gradual accretion (the kind of accretion which is deemed to have had no former owner, or rather to be lost to its former owner) seem to be exactly the same. And we do not know that it has ever been contended that a tenant for years may cut off the land which, in the course of the tenancy, has been added by gradual accretion from the sea or by the slow movement of a river from its bed, and return to the landlord the exact number of square feet which he received from him.

To return to Baron Parke's decision and dictum, we have found that, on the supposition that the stones became a part of the land, it is impossible to support the dictum; and on the facts of the case it is impossible to support any other supposition. For the only other supposition is that stones embedded in land are chattels unconnected with the land, the objection to which is that it is not true. It would be extraordinary, for instance, to hold that the executor, and not the heir, of the owner of the fee would take such stones.

We feel that we have been rash in venturing to question even a dictum of Baron Parke's, and are glad to be able to refer to a case in the Kings' Bench,¹ in 1835, containing at least dicta in support of the view we have expressed. The case was trespass for carrying away sand which had been blown from the sea-shore and formed mounds upon the land. The defendants justified by a custom, and since there cannot be a custom to take a profit *in alieno solo*, the question was whether it was a taking of a part of the ground, and the court held that it was. It may be possible to support the case merely upon the ground that the sand which had drifted in could not be distinguished from that originally there. Littledale, J., said, however: "Of what is soil in general composed?

¹ *Blewett v. Tregonning*, 3 A. & E. 554, 574-5.

Many things enter into it which are brought artificially or by accident, and the moment they are so brought they become part of the soil." And Patterson, J.: "I am, however, of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world."¹

THE case of *Leisy v. Hardin* last spring was regarded by some persons as indicating an alliance between the Supreme Court of the United States and the liquor interest,—a view which involved a failure to observe that the doctrine, beside having no peculiar application to the liquor traffic, was as old as Chief Justice Marshall's opinion in *Brown v. Maryland*, 12 Wheat. 419 (1827). A similar inattention to the real scope and meaning of a decision has caused the recent case of *Crowley v. Christensen*, 11 Sup. Ct. Rep. 13, to be proclaimed by the press as a vindication of prohibition, and hence, it would seem, as evidence of a change of heart on the part of the Supreme Court. How far such a view is from a true understanding of the case may be easily seen. In *Yick Wo v. Hopkins*, 118 U. S. 356, a San Francisco ordinance forbade any one to carry on a laundry without the consent of a board of supervisors. No express limitation was put on their power in the matter; and the court found in all the circumstances of the case, including the way in which the law was administered, an intention to give the board an arbitrary right to withhold its consent at will and by this means to discriminate against the Chinese. For these reasons the ordinance was held to deprive the petitioner of the equal protection of the laws within the meaning of the Fourteenth Amendment.² In *Crowley v. Christensen* an ordinance required every liquor dealer to take out a license, and for that purpose to obtain the consent of the police commissioners. Sawyer, J., held in the Circuit Court³ that the facts were not distinguishable in principle from *Yick Wo v. Hopkins*, and that the ordinance was therefore unconstitutional. As the case, however, was apparently free from any of the special circumstances which, together with the mode of administering the ordinance, indicated a grant of arbitrary power in *Yick Wo v. Hopkins*, the decision of Sawyer, J., obviously goes further than that case, and seems to lay down the proposition that the absence of express limitation is necessarily equivalent to a grant of unrestricted power. This is, however, a proposition for which *Yick Wo v. Hopkins* does not stand; and all that was necessary for the Supreme Court to decide in reversing the decision below was that the ordinance granted no such power in giving licenses, but only the right to give them on general grounds of fitness and convenience. Such a ground of decision would cover any other business as well as the liquor traffic, and would certainly not have any great significance in the prohibition controversy. And the opinion of Mr. Justice Field in *Crowley v. Christensen* does not appear to decide more than this. It contains, to be sure, extended observations on the mischief arising from the sale of liquor, but it nowhere countenances the view that a grant of arbitrary power to give

¹ There is a French case referred to in 20 Alb. L. J. 200, in which it was decided that a meteorite "cannot be an accession to the land upon which it alights. It belongs entirely by occupation to him who has found it." And Marcadé, after citing this case, added, "One can hardly conceive how an advocate could be found to entertain a contrary opinion."

² The court went on the further ground that even if the ordinance was constitutional on its face, its actual operation under State authority amounted to a practical denial by the State itself of the equal protection of the laws, and so entitled the petitioner to relief.

³ *In re Christensen*, 43 Fed. Rep. 243.

licenses would be constitutional ; and it expressly recognizes the right of the legislature to regulate any lawful trade. On principle it would seem that the case would have been governed by the same considerations if the ordinance had dealt with the licensing of restaurant keepers or apothecaries.

To refrain from drinking liquor, smoking, and playing cards or billiards is very likely not a detriment from a moral standpoint ; and the Supreme Court of New York points out in *Hamer v. Sidway* (11 N. Y. Supp. 182) that it cannot be disadvantageous in a pecuniary sense to abstain from habits which are "not only expensive, but unnecessary and evil in their tendency." But to say that no legal detriment is involved in such a course, *i.e.*, that no legal right is parted with, would probably surprise a good many persons who are in a situation similar to the plaintiff's in that case. The defendant's testator said to his nephew, fifteen years old, that if he would refrain from the habits above-mentioned till he was twenty-one, he would give him \$5,000 ; the nephew did so, and suit is brought on the promise. Whether the parties to the transaction regarded it as an offer for a unilateral contract, or merely as a promised gift (the latter was the view of the court), is a question of fact on which the result reached may have been correct enough, though the argument drawn from the use of the word "give" in the uncle's promise — that it presumably meant a gratuitous transfer, unless evidence could be brought forward to show the contrary — seems to overlook a common use of language. The conduct of the nephew, moreover, indicates that he thought he had something more than a mere moral claim. But the court's further suggestion, that even if there were an intention to contract the acts of the nephew, though performed at the uncle's request and in exchange for his promise, would not be a sufficient consideration, is surprising. The proposition that the promisee must incur a detriment *in a pecuniary sense* can hardly be sound, in any such application of it, at least, as the court would here make. These points were not, however, conclusive of the decision in *Hamer v. Sidway*, as there were further difficulties in the way of plaintiff's recovery.

A CASE presenting a very curious situation of affairs has recently been decided in the courts of Massachusetts, and is now on its way to final settlement in the Supreme Court of the United States. The facts are briefly as follows : The county of Nantucket comprises and is coterminous with the town of the same name. In 1888 the selectmen of the town discovered that the town treasurer, one Brown, had been fraudulently obtaining money from the town for a number of years by means of forged vouchers. A town-meeting was immediately called, which was very largely attended by the voters of the town, and at which it was unanimously decided to take steps towards having Brown prosecuted. Accordingly, at the next session of the Superior Court for the county of Nantucket, a grand jury, drafted by the selectmen at a town-meeting called for that purpose, brought in an indictment against Brown for forgery. The trial jury was also drafted by the selectmen in like manner. Before pleading to the indictment, the defendant asked the judge to rule that the grand jury, by reason of bias and interest, was not competent to make the presentment for the crime. And

the trial jury was objected to for the same reason. The Court refused so to rule, and the defendant excepted. The Supreme Court (*Com. v. Brown*, 147 Mass. 585) upheld the ruling of the trial judge, on the ground that the interest of the jurors in both cases was not sufficient to incapacitate them, and that the interest of the selectmen was not sufficient to render the draft illegal. In the course of the opinion the court remarked that the defendant could not have been indicted in any other county than Nantucket.

The exceptions being overruled, the defendant pleaded to the indictment, and a verdict was found against him. After the trial had begun the defendant's counsel learned for the first time that some, if not all of the members of both juries had been present at the meeting at which it was voted to prosecute Brown, and had voted for the prosecution. He immediately filed a plea of exception to the jurisdiction, on the ground that the members of both juries were incompetent, because of their participation in the town-meeting; that under the circumstances of the case it would be impossible to get an impartial jury in the county of Nantucket; and that the present trial, and any trial by the court in that county, would be in violation of the Constitution of Massachusetts, and of the Fourteenth Amendment of the Constitution of the United States. The court overruled the plea and the defendant excepted. The Supreme Court (*Com. v. Brown*, 150 Mass. 334) overruled the exception. The court held that the plea amounted to a motion in arrest of judgment, and that the objection to the jurisdiction on the above grounds, not appearing on the record, could not be brought before them.

The conviction was therefore affirmed, the defendant was sentenced and imprisoned. Two weeks later his counsel obtained a writ of review from a court of the United States, and the defendant was released on bail. The case is now docketed in the United States Supreme Court, where, unless advanced, it will not come up for three years. It is not altogether unlikely that that court may decide in favor of the defendant Brown, and in that event, as it is admitted that he cannot be tried in any other county, the Legislature of Massachusetts will have the question forcibly presented whether some change in the judicial system of the county of Nantucket is not desirable.

IN a case at the Drogheda Sessions, mentioned by the March "Jurist," the defendant, being sued for rent, "pleaded the house was haunted, and his wife had been greatly frightened by a ghost appearing at their bed and throwing something upon her at night; they had to leave the house, and witness would prove it was haunted." The court ruled, correctly as it would seem, that these facts did not constitute a defence; but if the lease were of a furnished house the question might perhaps be more doubtful. According to the doctrine of *Smith v. Marrable* (11 M. & W. 5) there is an implied covenant in such a case that the house is reasonably fit for habitation, and the fact that the house is infested with bed-bugs is a breach of this covenant. If the presence of the ghost should be thought equally objectionable, he might thus become a material issue; but it may be doubted whether the court would think there was substance enough in a ghost for judicial investigation.

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

WILLS — INCORPORATION BY REFERENCE. — (*From Prof. Gray's Lectures.*) — To incorporate in a will a document which is not duly attested, the latter must be so described in the will as to be capable of identification. This identification, as is pointed out in *Allen v. Maddock*,¹ will always be to some extent a question of parol evidence; but the document must be referred to as one then existing; if there is not such a reference, it is immaterial that there is already in existence a paper which satisfies the description. This latter point is illustrated by *Goods of Sunderland*,² where the words of the will, according to the construction put upon them by the court, were never meant to describe the particular paper previously executed, but were ambulatory, and intended to cover any paper which the testator might make in the future. *Goods of Truro*,³ raised the further question, how far the republication of the will by a later valid codicil might have the effect of adding to the will something which was not a part of it when executed, and which was not mentioned in the codicil; e.g., a memorandum referred to in the will, but not prepared till after its execution. Sir J. P. Wilde (Lord Penzance) held that a codicil might have this effect. The will, he said, was to be read as if the testator had sat down and reexecuted it at the time of making the codicil; and if there were in it any words which, speaking from the date of the codicil, would contain a sufficient reference to a document as then existing to incorporate it within the principle of *Allen v. Maddock*, that document might be treated as part of the will.

The test thus laid down seems open to some criticism. These cases of incorporation by reference present two difficulties which should not be confounded. (1.) The words of the will may be ambulatory, as in *Goods of Sunderland*, above. This difficulty is apparently a fatal obstacle in the way of incorporating any paper, though it falls within the description; for it is impossible to show any reference in the will to that particular document. (2.) The paper, though specifically described, — e.g., "the letter which I mean to write to-morrow," — may not be in existence when the will is made, and therefore be invalid as a testamentary instrument, for lack of due execution. This objection seems to be removed, however, by a good codicil made after the preparation of the memorandum; for the codicil is properly executed, and the will, republished by the codicil, contains a sufficient reference to this memorandum, which may therefore be treated as a valid testamentary disposition. The test of *Goods of Truro* would seem, however, if strictly applied, to lead to a contrary result in the case just put; for the words of the will, treated as if reexecuted at the date of the codicil, will still be found to refer to the

¹ 11 Moo. P. C. 427; 4 Gray's Cas. Prop. 198.

² L. R. 1 P. & D. 198; 4 Gray's Cas. Prop. 217.

³ L. R. 1 P. & D. 201; 4 Gray's Cas. Prop. 219.

future, and not to any document as existing. And for this reason, that the language of the will was of a future character, Sir J. P. Wilde refused, in *Goods of Mary Reid*,¹ to give effect to a paper prepared after the will, though it was apparently sufficiently described in the will and was followed by a good codicil. But in most cases the rule of *Goods of Truro* would probably lead to the same result as the test here suggested.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — IMPLIED POWER — EXTRINSIC FACT. — Where an agent has authority to borrow money on exceptional terms in cases of emergency, the lender is not bound to inquire whether the emergency has actually arisen; but if he acted in good faith and without notice that the agent has exceeded his authority, he can recover from the principal. *Montaignac v. Shitta*, 15 App. Cas. 357 (Eng.).

The principle of this case would seem to be that where the agent is empowered to act on the existence of an extrinsic fact the principal is bound by the agent's representation as to the existence of that fact when it is peculiarly within the agent's knowledge. If so the case would be contrary to *Grant v. Norway*, 10 C. B. 665, and in accord with *N. Y. & N. H. R. R. v. Schuyler*, 34 N. Y. 30.

BILLS AND NOTES — PAROL EVIDENCE. — Parol evidence is admissible to show that a demand promissory note made by a daughter to her father was in fact executed under an agreement that it should never be enforced, but should serve as a mere memorandum of an advancement. *Brook v. Latimer*, 24 Pac. Rep. 946 (Kan.).

CONSPIRACY — MALICE. — An action will lie for a combination or conspiracy to drive a trader out of business by fraudulent and malicious acts. The gravamen of a civil action is malice, conspiracy being matter of inducement only. *Van Horn v. Van Horn et al.*, 20 Atl. Rep. 485 (N. J.).

Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, was cited and approved.

CONSTITUTIONAL LAW — EQUAL PROTECTION. — The allowance of the right of appeal to citizens of the State at large in all cases of conviction of crimes before a justice of the peace, and a denial of such right to citizens of Detroit, convicted of similar offences in the police court of that city, where the sentence imposed does not exceed twenty days imprisonment or a \$25 fine, does not deprive citizens of Detroit of the equal protection of the laws guaranteed to all citizens of the United States by the Constitution, Amendment 14, § 1, as the act providing for appeals from the police court of Detroit operates equally on all persons within its jurisdiction. *Sullivan v. Han*, 46 N. W. Rep. 795 (Mich.).

CONSTITUTIONAL LAW — POLICE POWER — INTOXICATING LIQUORS. — A San Francisco ordinance provided that one seeking a liquor-dealer's license must first obtain the written consent of a majority of the police commissioners, and in case of a refusal in the first instance, such consent was to be given upon the written recommendation of not less than twelve citizens owning real estate in the block in which the business was to be carried on. Held, the ordinance was constitutional. *Crowley v. Christensen*, 11 Sup. Ct. Rep. 13. See note on this case *supra*, p. 236.

CONTRACTS — INTERPRETATION — CHARTER-PARTY. — By the charter-party the charterer contracted to pay demurrage for delays over and above the lay-days allowed, and the owner agreed to render all customary assistance in unloading. The lay-days were exceeded on account of a strike by the dock laborers employed

¹ 38 L.J. n. s. (P. & M.) 1; 4 Gray's Cas. Prop. 223.

by the stevedores of both parties. The jury, on this evidence, found that the shipowners were not "ready and willing to do their part of that which it was customary for them to do." *Held*, that nevertheless the shipowner was entitled to demurrage. The obligation of the consignee to pay demurrage is absolute. The readiness and willingness of the master to do his part is not a condition precedent or concurrent. The consignee is liable unless he was prevented from unloading by the act of the master. *Budgett & Co. v. Binnington & Co.*, 39 W. R. 13 (Eng.).

CORPORATIONS — RESIGNATION OF DIRECTOR. — Where the charter contains nothing in regard to the resignation of directors, they contract to serve until their resignation is accepted by the company, and cannot be free from their office merely by tendering their resignation. It seems also that the board of directors, with general power to manage the company's affairs, have no implied power to accept such resignation. *Municipal Land Co. v. Pollington*, 63 L. T. Rep. N. S. 238 (Eng.).

CRIMINAL LAW — CONSTRUCTION OF STATUTES. — The selling liquor to a minor on his representation that it is needed for his sick mother's immediate use, but without a written order, though within the letter, is not within the spirit, of Pen. Code Tex. art. 376, which makes it a misdemeanor for any person to knowingly sell liquor to a minor without the written consent of his parent or guardian. *Waldstien v. State*, 14 S. W. Rep. 394 (Tex.).

CRIMINAL LAW — EVIDENCE OF ACCOMPLICES. — It is a general rule of practice to advise a jury not to convict on the uncorroborated testimony of an accomplice, but it is not error to refuse to do so. *Com. v. Wilson*, 25 N. E. Rep. 16 (Mass.).

EQUITY JURISDICTION — STATUTE OF LIMITATIONS — FRAUD. — A plaintiff sues in equity because he is barred at law, and claims that he is barred at law by reason of having failed to bring suit in time, and that his failure to bring suit in time was caused by the fraudulent conduct of defendants. *Held*, that, as the fraud charged is collateral to the plaintiff's cause of action (contract) and not the foundation of the suit, equity will afford no relief. *Jaffrey v. Bear*, 42 Fed. Rep. 571.

INSOLVENCY — ASSETS — ALABAMA CLAIMS. — The assignee of one who made an assignment in bankruptcy before 1871 is not entitled to the sum paid the assignor for "war premiums" out of the residue of the Geneva Award. Such claims were expressly excluded from the award by the commissioners, therefore it cannot be said that at the time of his assignment the assignor had any right against Great Britain or the United States. *Tait v. Marsily*, 24 N. E. Rep. 926 (N. Y.).

INSOLVENCY — FRAUDULENT CONVEYANCES. — Where one of the terms of the sale of his business by an insolvent debtor is that he is retained in the management thereof at a salary, there is a benefit secured to him which renders the transaction fraudulent as against creditors. *Stephens v. Reginstein et al.*, 8 So. Rep. 68 (Ala.).

LIBEL — CRIMINAL PROSECUTION. — The following false words were published by a newspaper: "It is now almost forgotten that Governor Haney pardoned his own brother out of the penitentiary." *Held*, that they constituted a libel for which a criminal prosecution could be maintained. It is enough in a criminal action that the alleged libellous words were directed against a family. *State v. Brady*, 24 Pac. Rep. 948 (Kan.).

LIEN — INNKEEPER — MARRIED WOMAN'S SEPARATE PROPERTY. — Where a husband and wife stay together at a hotel, and the husband is the sole contracting party to whom credit is given, the separate property of the wife is not liable for the unpaid balance of the hotel charges; but the innkeeper has his lien on the wife's goods and luggage, because he was as much compelled to receive them as the husband's goods. *Gordon v. Silber*, 25 Q. B. D. 491 (Eng.).

LOSS OF CONSORTIUM. — A wife cannot maintain an action against another woman for debauching her husband. *Doe v. Roe*, 20 Atl. Rep. 82 (Me.).

A similar decision was reached lately in Wisconsin (45 N. W. Rep. 523). But see *Westlake v. Westlake*, 34 Ohio St. 621, and *Lynch v. Knight*, 9 H. of L. Cas. 577, *contra*.

MEASURE OF DAMAGES. — In an action against a town for injuries resulting

from a defective highway, it appeared that the plaintiff, after having so far recovered from his injuries (a broken leg) as to be able to be about on crutches, had his leg broken a second time by an accident to a carriage in which he was riding. The court instructed the jury that if there was no negligence on the part of the plaintiff contributing to the second accident, and if the injury would not have occurred except for the weakened and impaired condition of his leg resulting from the previous accident, in contemplation of law the second breaking would be a direct consequence and result of the previous accident, for which the plaintiff could recover damages. *Held*, that the instructions were correct. *Weiting v. Millston*, 46 N. W. Rep. 879 (Wis.).

PROPERTY — APPORTIONMENT — INCOME. — The X. Company divided a portion of a reserve fund created by setting aside from time to time a portion of the current profits. *Held*, that, as between tenant for life and remainder-man under a settlement, this must be considered income, although a portion of the fund came from profits earned and set aside in the testator's lifetime. *In re Alsbury*, 45 Ch. D. 237 (Eng.).

This case follows *Bouch v. Sproule*, 12 App. Cas. 385, which, in deciding that a given payment was capital, laid down the principle that a reserve fund like this was either capital or income, as the company chose to treat it. Previous to this case the authorities were conflicting, and there was an impression that such a fund was capital.

QUASI CONTRACTS — SUPPORT OF PAUPER. — The plaintiff furnished a pauper with necessaries which the defendant was legally bound to provide. The defendant had already been notified by the plaintiff of the destitute state of the pauper. *Held*, that the plaintiff could recover from the defendant on the ground of an implied promise to pay for the necessities supplied. *Eckman v. Township of Brady*, 45 N. W. Rep. 502 (Mich.).

REAL PROPERTY — COVENANTS RUNNING WITH THE LAND. — The owner of land covenanted to give the covenantee one-eighth of the lead ore mined by him on his land. *Held*, that the parties were tenants in common of all the ore in the land, and that the covenant was binding upon the devisee of the covenantor. *Crawford v. Witherbee*, 46 N. W. Rep. 545 (Wis.). The conclusion reached in this case, that the burden of the covenant would run, was right; but it would seem that the reasoning of the court was erroneous. If it were true that the parties became tenants in common, the covenant would not run. But if upon a true construction of the deed the covenantee simply obtained a right of profit in the land, the decision would be correct; for, according to the American authorities, a covenant in aid of a profit will bind the assignee of the covenantor. See *Morse v. Aldrich*, 19 Pick. 449.

REAL PROPERTY — ESTOPPEL. — An heir-apparent conveyed the land of her ancestor by a warranty deed, and died in the lifetime of her ancestor, leaving children. *Held*, that on the death of the ancestor the land would go to the children, and would not pass to the grantee by estoppel. The children take the land as heir of the ancestor, and not of the grantor. *Habig v. Dodge*, 25 N. E. Rep. 182 (Ind.).

REAL PROPERTY — POSSESSION OF TENANT — NOTICE TO VENDEE. — The possession of land by a tenant is sufficient notice of the landlord's title under an unrecorded deed to put a purchaser on inquiry. *Levy v. Holberg*, 7 So. Rep. 431 (Miss.).

REPLEVIN — DEPRECIATION PENDING APPEAL. — The plaintiff brought replevin for bonds which the defendant, by giving security, retained in his possession during the trial. The plaintiff got judgment for the bonds and, under a provision of the code, for the depreciation up to the date of the judgment. The defendant appealed and the judgment was affirmed. This action was brought to recover the loss due to depreciation between the date of the judgment and the final affirmance. *Held*, the action would not lie. *Corn Exchange Bank v. Blye*, 25 N. E. Rep. 208 (N. Y.).

SALES — WARRANTY. — Vendor of a horse gave a written warranty that the horse was registered in the Stud Book of England. *Held*, in an action for the failure of this warranty, that the seller could not show, by parol evidence, that prior to the sale he had informed the purchaser that the horse was not registered. *Watson v. Roode*, 46 N. W. Rep. 491 (Neb.).

SLANDER — WORDS ACTIONABLE PER SE. — A Catholic priest told his congregation that the plaintiff, a physician, had been excommunicated; that therefore they should not employ him; and if they did they could not have the ministrations of the priest while he was under their roof. *Held*, that the words were actionable *per se*, as they affected the plaintiff in his capacity as a physician. *Morasse v. Brochu*, 25 N. E. Rep. 74 (Mass.).

STATUTE OF LIMITATIONS — OFFSETTING DEBTS AGAINST LEGACIES. — The debts due testator by legatees cannot be set off against legacies, if the period of limitation has run before time of distribution.

The allowance of a dividend on the debts, by the debtors' assignee, for benefit of creditors, does not arrest the statute after it has begun to run, for the assignee is not the agent of the debtor. *In re Light's Estate*, 20 Atl. Rep. 536 (Pa.).

TRUSTS — CHARITABLE BEQUEST — CERTAINTY. — A bequest as follows: "And the rest, if there be any, [I give] to such charitable purposes as my said trustee may deem best," — is sufficiently definite, and will be carried into effect. *Powell v. Hatch*, 14 S. W. Rep. 49 (Mo.).

TRUSTS — STATUTE OF LIMITATIONS. — Where one having stock standing in his name sells it to another, and gives a receipt for the money, reciting that it is the first instalment on a certain number of shares of the stock, "standing in my name, but owned by him, and he remaining responsible for the balance of the instalments when called in," but containing no agreement as to the future disposition of the stock or the dividends therefrom, the transaction raises an implied trust against which the Statute of Limitations will run. *Cone et al. v. Dunham*, 20 Atl. Rep. 311 (Conn.).

WILLS — CONSTRUCTION. — Where a will creates a valid trust and names a trustee, the trustee takes the legal title to the trust estate although there are no words of gifts to him. *Toronto Co. v. R. Co.*, 25 N. E. Rep. 198 (N. Y.).

WILLS — CONSTRUCTION. — In the draft of the will the word "including" on page 1 was changed at the testator's direction to "excluding." In the copy which the testator executed the word "including" on page 1 was left standing, and "including" on page 12 changed to "excluding." *Held*, that "excluding" on page 12 could be altered back, but that no alteration could be made on page 1. *Goods of Huddleston*, 63 L. T. Rep. N. S. 255 (Eng.).

This decision, it would seem, can only be supported on the theory of dependent relative revocation. This case seems an extreme application even of that doctrine. It was, however, an uncontested case.

WILLS — CONSTRUCTION. — A testator gave an annuity to A., and from and immediately after her death to such child or children of hers as should attain twenty-one. But if A. died "without leaving any such child," he gave the annuity to others. A. died without leaving any children, but had had a child who attained twenty-one in her lifetime. *Held*, that the representatives of the deceased child take nothing. Where there has been a vested interest in a capital sum, the court has construed "leaving" as if written "having had," to avoid taking away that vested interest. But an annuity is a personal provision, and this doctrine has never been applied to it. *In re Hemingway*, 63 L. T. Rep. N. S. 218 (Eng.).

WILLS — CONSTRUCTION — REMAINDERS. — Testator devised his residuary estate to trustees "during the life of my son D., in trust for said D., and 'after the death of said D. I give and bequeath all the property affected by the above trust to my own right heirs.'" *Held*, that an estate in remainder vested on testator's death in D., his only heir, so that on D.'s death the estate went to his heirs, and not to those who were then the testator's heirs. *In re Kenyon et al.*, 20 Atl. Rep. 294 (R. I.).

REVIEWS.

THE VETO POWER : ITS ORIGIN, DEVELOPMENT, AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES. By Edward Campbell Mason. Edited by Professor Albert Bushnell Hart. Boston, 1890 : Ginn & Co. 8vo. Pages 230.

The present monograph is the first of the series entitled "Harvard Historical Monographs," and is an exposition and discussion of the veto power as it is found in the Constitution of the United States.

The first chapter is an attempt to prove historically that the veto power, as its nature would indicate, and as various constitutional writers have intimated, is a part of the legislative power of the government. The idea is carefully worked out, and makes one of the most interesting chapters in the monograph.

The body of the work is taken up with a discussion of the presidential vetoes. These have been classified according to the subject-matter of the bills vetoed. For example, we find all the tariff vetoes grouped together under the general head of "financial vetoes." By this arrangement the discussion will be of use not only from the point of view of the veto power, but will also be of assistance in any study of the various subjects touched upon.

Perhaps the most striking fact in the book is the number and character of President Cleveland's vetoes. They are more than twice as numerous as those of all his predecessors together, and they were in most cases imposed on pension bills. The expediency and constitutionality of these pension vetoes has been dwelt on at some length, and in the opinion of the author they were justified from both points of view.

Chapters V. and VI. are more likely to be generally read than any others in the work, for they give the author's conclusions on various political and constitutional questions raised by the use of the veto power.

The plan evidently has been to make any fact in the book and all related facts easily accessible; for the table of contents and index are full and conveniently arranged, while foot-notes, cross-references, and appendices are numerous and as complete as possible. Some of the appendices, as, for example, the list of vetoes and the legislative activity of the Presidents, are of great value.

The work as a whole impresses one as being well conceived and skilfully executed. It is clear, and for the most part concise, although some points have been dwelt on with rather more fulness than seems necessary. It is, in short, a book which workers in history will appreciate gratefully.

G. C.

THE SUPREME COURT OF THE UNITED STATES. By Westel W. Willoughby. Johns Hopkins University Studies. The Johns Hopkins Press, Baltimore, 1890. 8vo. Pages 124.

The work gives a short, concise statement of the origin and conception, the establishment and the history, of the Supreme Court of the United States. The functions and powers of the court are well brought out by discussion of the leading cases decided by it. The relations of the court to Congress, to the Executive, and to the State legislatures and judiciaries are treated of in separate chapters. The part the court has played in politics and its present pressing needs are pointed out. The work is a useful one for the general reader, and contains many useful hints for the student.

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POLES AND WIRES IN THE STREETS FOR THE ELECTRIC RAILWAY.

NOT without challenge have all the appliances of the witches' "broomstick train" been set up in so many of our cities during the past few years. It is not the return of the witches, however, that troubles the practical people of this present time, but rather the setting up of a row of innocent poles in the streets and stretching a wire overhead charged with the electric current. It is not "the black cat's purr as the train goes by," nor even the gleam of the old hag's wicked eye, but rather the obstruction of travel by the poles, or the effect of the current in the wire on conversation by telephone, that leads to applications for injunction against the use of the electric railway.

Whatever the reason, it is true that the new mode of propelling street cars has given the courts a new subject for discussion and has produced, already, a whole line of legal decisions of greater or less authority. It seems likely that the witches have come to stay, and that they will soon infest the whole country, and it may be interesting to see how the courts are dealing with them again after a rest of "a couple of hundred years or so." It is quite safe to say that the courts will not attempt to meddle again with the witches themselves; but, without stopping to inquire whether Dr. Holmes has told us truly "where was the motor that made it go," the courts will deal rather with the questions by what right these poles and wires are put up in the streets,

whether these new appliances are an additional burden on the land, and whether this powerful current shall be allowed to interfere with our conversations over the telephone.

It may be interesting to refer to some of the recent decisions on these three questions, and, as many of the cases are not yet reported, an account of them may prove useful to persons engaged in the controversy on either side.

(1.) The question by what authority such use may be made of the public streets is not new, and is governed entirely by decisions relating to similar uses of the streets. It is only necessary, therefore, to allude to the general rules on the subject, and to refer to the text-books where the matter is discussed.

It is well settled that the use of the streets belongs to the public at large as distinguished from the municipality, that the Legislature represents the public, and that the municipality has no control over the streets except what is given to it by the Legislature, either expressly or by implication.¹

The Legislature has (in the absence of constitutional restraint, and subject to the property rights and easements of the abutting owner) full and paramount authority over all public ways and public places.²

From this it follows that

The authority of municipalities over streets and the uses to which they may be put depends entirely upon their charters or the legislative enactments applicable to them.³

The public easement in the highways is vested in the public, and can be divested by nothing short of an exercise of sovereign power. The Legislature, representing the public, may release the public right by vacating the highway, may modify the public use by granting a right to use the highway for a horse railroad, or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the Legislature can thus do, it may delegate authority to do. . . . No reason appears why all such authority possessed by the Legislature may not be thus delegated. But the delegation of such power must plainly appear either by express grant or by necessary implication.⁴

¹ State, Hoboken Land Imp. Co., pros., *v.* Hoboken, 35 N. J. L. 208.

² 2 Dill. Mun. Corp., 4th ed., § 656 (518), and cases cited.

³ 2 Dill. Mun. Corp., § 680 (538).

⁴ Per Magie, J., in Domestic Tel & Teleph. Co. *v.* Newark, 49 N. J. L. 344-346 (1887).

City charters usually confer upon the municipal government general power to control and improve the streets, and under this power it has been held that cities may authorize them to be used for many purposes of public convenience other than travel or transportation. They may do all acts appropriate and incidental to the beneficial use of the streets by the public not inconsistent with the free use of them for travel. They may cut down trees, may change the grade, and may lay down sewers and drains.¹ They may construct a public cistern,² although this is not undisputed.³ They may provide for lighting the city, and for this purpose may put up lamp-posts; and it has been held that for this purpose they may contract with others to supply the city with gas, and use the streets to do so.⁴ The laying of water-pipes rests upon the same principle;⁵ but in England the right to lay down gas-pipes in the highways can only be conferred by legislative authority;⁶ and the same is true in America of country highways.⁷ The authority must be purely incidental to and in furtherance of the right to control the streets.⁸

But in none of these cases can a municipality grant an exclusive franchise or permanent privilege, and it is because many of these grants are to a certain extent exclusive that special legislative authority is required to give full effect to them.⁹

The right to operate an ordinary steam railroad in the streets cannot be granted by the city;¹⁰ and it is generally held that a telegraph or telephone line imposes a new burden, and cannot be authorized by the municipality alone.¹¹ With respect to horse

¹ 2 Dill. Mun. Corp., 4th ed., § 689 (542); *Traphagen v. Jersey City*, 29 N. J. 206, 446; *Michener v. Philadelphia*, 18 Pa. St. 535; *McKevitt v. Hoboken*, 45 N. J. L. 482.

² *West v. Bancroft*, 32 Vt. 367.

³ *Dubuque v. Maloney*, 9 Iowa, 450.

⁴ *State v. Cinc. Gas Light & C. Co.*, 18 Ohio St. 262 (1868); *Indianapolis v. Indianapolis Gas Light Co.*, 66 Ind. 396; 2 Dill. Mun. Corp., § 692 (547).

⁵ 2 Dill. Mun. Corp., § 697 (551).

⁶ *Queen v. Charlesworth*, 16 Q. B. 1012.

⁷ *Bloomfield & R. N. Gas C. Co. v. Calkins*, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. St. 35.

⁸ *Richmond Co. Gas Light Co. v. Middletown*, 59 N. Y. 228; *Dodge v. Davenport*, 57 Iowa, 560.

⁹ See Dill. Mun. Corp., § 691 (546), note; § 693 (547), § 694 (549), and cases cited.

¹⁰ 2 Dill. Mun. Corp., § 705 (558).

¹¹ *State, Domestic Teleg. & Teleph. Co., pros., v. Newark*, 49 N. J. L. 344; Dill. Mun. Corp., § 698 (552), and note.

railroads there is some difference of opinion. Judge Dillon says (sects. 717 and 725) that the power must come from the Legislature, but that the ordinary powers are often ample enough to authorize cities to allow the streets to be used for local travel by means of such railroads, but they cannot confer corporate franchises nor authorize taking of tolls. It was decided in New York, in 1856, that an exclusive right could not be thus granted; but on the question whether the municipality might, by a mere license, revocable at pleasure, authorize persons to build such a railroad the judges were divided.¹ The New Jersey Supreme Court said, in 1872, that the power had never been exercised in that State under a mere grant of power to regulate streets, and that the attempt to assert it would doubtless provoke the most determined resistance.²

It is certainly true that the right to operate a horse railway is a privilege giving the cars the preference in the right of way over other vehicles, so that a line of omnibuses, for example, will not be allowed to run regularly upon the tracks to the injury of the business;³ and although it is well settled that horse railroads are a legitimate use of the streets for public travel, it is usually considered necessary to have special legislative authority to operate a line with all the privileges which are generally required.

Whether an electric railway stands on the same footing with a horse railway, or is rather to be classed with a steam railway, depends on the question whether it is a new use of the street for a different purpose, and imposes a new burden on the land, and these questions will be discussed with reference to the right of the adjoining owner to compensation; but before coming to that it may be said that whether or not the municipality has a right to authorize a change of motive-power, it is certain that the Legislature has such right, and also that if the electric railway is, in fact, a street railway, the Legislature may confer power to use electricity under a general grant of power to operate and maintain a street

¹ *Davis v. New York*, 14 N. Y. 506.

² *State, Montgomery, pros., v. Trenton*, 36 N. J. L. 79-83. See also *Atty. Gen. v. Metrop. R.R. Co.*, 125 Mass. 515; *Stanley v. Davenport*, 54 Iowa, 463; *Hinchman v. Paterson Horse R.R. Co.*, 17 N. J. Eq. 75; *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R.R. Co.*, 20 N. J. Eq. 61; *Sixth Ave. R.R. Co. v. Kerr*, 45 Barb. 138; *Galbreath v. Armour*, 4 Bell, App. Cas. 374; *Boston v. Richardson*, 13 Allen, 146; *Sears v. Marshalltown St. R'y Co.*, 65 Iowa, 742; *Redfield on Railways*, 3d ed., p. 317.

³ *Camden Horse R.R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525.

railway, provided only that the use of the new power does not so change the character of the railroad as to abuse the privilege of the use of the streets and create a public nuisance. This was held in a recent and well-considered case in New Jersey.¹ The company was organized under a general law for the formation of companies to operate street railways for the transportation of passengers; no special motive-power was mentioned. Vice-Chancellor Van Fleet, referring to this fact, said:—

Hence under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation organized under this statute takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars that may be fit and appropriate to that end, which does not prevent that part of the public which desires to use the streets according to other customary methods from having the free and safe use thereof.

And it was held that the company was entitled to use electricity conveyed by overhead wires. There was, in fact, another statute distinctly authorizing the use of electric motors, with the consent of the city, which had been given; but the Vice-Chancellor said that even without this the general grant was sufficient, if it appeared that electricity could be used without preventing the free and safe use of the street by other means of transportation.

(2.) Supposing a franchise to have been obtained from the proper authority for the use of electricity, and to place poles and wires in the streets to carry this current, the question remains, whether this is such a new use of the streets as to impose a new burden upon the lands and to involve the payment of compensation to the abutting owners.

Judge Dillon, in the last edition of his book on Municipal Corporations (2 Dillon, *Mun. Corp.*, § 734 *c*, note), refers to a recent case in Rhode Island, decided while his book was in press, in which it was held that the erection of poles in the streets, with wires for the purpose of propelling street cars by electricity, did not entitle the owner to compensation.² The company had authority from the Legislature to use steam, horse, or other power, as the City Council might from time to time direct; and the Council had given permission to use electricity, with poles and wires. On an applica-

¹ *Halsey v. Rapid Transit Ry. Co.*, Dec. 6, 1890, 20 Atl. Rep. 859.

² *Taggart v. Newport Street Railway Co.*, Jan. 25, 1890, 19 Atl. Rep. 326.

tion by an owner of abutting land for injunction, the Supreme Court held that, since there was no change in the mode of using the streets, but only in the motive-power, there was no additional servitude. The court distinguished this case from those relating to telegraph and telephone wires, by saying that these are not used to facilitate the use of the streets for travel and transportation, "whereas the poles and wires of the railroad company are directly ancillary to the uses of the street as such, in that they communicate the power by which the cars are propelled." Judge Dillon throws discredit upon this decision by saying, "The distinction last mentioned is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement."

This remark was made less than a year ago, and the subject is already being rapidly developed, and must soon reach a settlement. The law must follow close upon the progress of inventions, and the application of electricity to street railroads is being made so quickly and so generally that the conclusions of the law in regard to the use of the new power cannot be long delayed.

It is, of course, too soon yet to attempt in an article in a magazine to say how the questions will be settled by the general concurrence of decisions or by the weight of authority, but we may consider some of the principles involved in the discussion, and refer to the cases which have been decided in various courts since this remark of Judge Dillon's upon the case determined in Rhode Island last February.

It is hard to tell whether Judge Dillon means to suggest that the courts were mistaken in holding that the telegraph and the telephone do not come within the natural and proper uses of the street, or whether he thinks that it is going too far to allow the electric railway. It may well be that the distinction between the telegraph and the railway is not sound, and yet that the railway is a proper use of the street. Whether both are to be included in the same class depends a good deal on the breadth of the view that is taken of the proper uses of a street. If these are confined to travel and transportation, then the railway may be included, while the telegraph is left out; but if the use of the street is to provide for communication, then it would seem to be just as well to send messages along it upon wires arranged for the purpose, as to send them on by men on horseback, or in heavy

wagons carrying the mails. It has been held in Massachusetts and Missouri that the telegraph is not a new burden upon the streets;¹ and in the numerous cases in which it is held otherwise it was so held upon the ground that the telegraph and telephone are not used to facilitate public travel, and that if they do transmit intelligence, they do so by a method so different from the ordinary use of the streets as not to come within the public easement.²

In Virginia the Court of Appeals has recently decided that the right acquired by the public in the condemnation of a highway is only the right of the public to pass along it, and that the untaken parts, being private property, cannot be occupied by telegraph poles without compensation.³

In New Jersey the decisions rest partly on a statute providing for compensation.⁴ On the whole it is safe to say that these decisions against the use of the streets for the telephone and telegraph are not sufficient to determine the question of the use of the streets by the electric railway, and whether the distinction drawn in the Rhode Island case is sound or not, the question of the use of the electric railway must be decided by itself.

The question is, whether the poles and wires and the street railway operated by electricity constitute a new burden upon land. It is a street railway operated by a new motive-power and with new appliances, but for the same purposes as a horse railway. It is important, therefore, to see whether a horse railway is considered an additional burden, and, if not, whether the electric railway has the same characteristics as those which make the horse railway a proper use of the street, or is to be classed rather with the ordinary steam railroad which has been held to impose an additional servitude.

There is a very general agreement of authorities, with some difference of opinion in New York, that the use of a street for a horse railroad is a legitimate use of it for public travel consistent with the purposes for which it was laid out, and does not impose a new burden upon the land. In New York a distinction is made

¹ *Pierce v. Drew*, 136 Mass. 75. *Julia Building Assoc. v. Bell Teleph. Co.*, 88 Mo., 258.

² *Dill Mun. Corp.*, § 698-698 a., note citing cases. *Lewis Em. Dom.*, secs. 131, 226 and cases. *Halsey v. Rapid Transit R'y Co.*, 20 Atl. Rep. 859-864 per Van Fleet, V. C.

³ *Western Union Tel. Co. v. Williams*, Mar. 27, 1890, 11 S. W. Rep. 106.

⁴ *Broome v. N. Y. & N. J. Teleph. Co.*, 42 N. J. Eq. 141; *Roake v. Am. Teleph. Co.* 41 N. J. Eq. 35

between cases in which the fee of the street is in the abutter and those in which the fee is in the city; but this distinction is not generally approved, and it seems to be accepted that in either case a horse railroad authorized by statute is not inconsistent with the rightful uses of a street.¹ Mr. Lewis, in his recent work on Eminent Domain, says:—

It has been determined in numerous decisions, and without dissent, except in New York, that the use of the street by a horse railroad constructed and operated in the ordinary manner falls within the purpose for which streets are established, and, consequently, that for any damage resulting from such use to the abutting owner he can recover no compensation, whether the fee is in the public or not.²

Mr. Lewis, however, goes on to say that in his own opinion, although the difference between the ordinary horse railway and the ordinary steam railway is obvious, yet the difference is only one of degree. The essential characteristic of both roads is that an exclusive franchise is granted in the soil of the street, and that if the principle of the horse railroad cases is sound, then a street may be so filled with tracks as practically to exclude all other travel and traffic from the streets.³ The law, however, is settled by the great weight of authority that the street railway is not in itself an additional burden, and the proviso is that it shall leave the land-owner free right of use and of access to his land. Judge Cooley, in his work on Constitutional Limitations (sect. 688), says:—

When land is dedicated for a street, it is unquestionably appropriated for all the ordinary purposes of a street, not merely for the purposes for which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use of heavy carriages which run upon a grooved track; and the appropriation of important streets in large cities for their use is not only a frequent necessity which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving.

Judge Dillon and Mr. Mills reach the same conclusion.⁴

¹ *Hussner v. Brooklyn City R.R. Co.*, 114 N. Y. 433, 11 Am. St. Rep. 679.

² Lewis, Em. Dom., sect. 124.

³ See also the dissenting opinion of Earl, J., in *Story v. N. Y. El. R.R. Co.*, 90 N. Y. 179-189.

⁴ Mills on Em. Dom., sect. 205; 2 Dill. Mun. Corp., § 722. But if a street railway is laid along the margin of the sidewalk so as to disturb the grade, and so as to be in fact

It is equally well settled that the ordinary steam railroad, as now conducted, is not within the purposes for which a street is dedicated, and does impose an additional burden upon the abutting owner.¹

The same cases which allow the horse railroad to be within the proper uses of a street declare that the steam railroad is not.² The reason for the distinction is not the motive-power, but the mode of using the streets, the purpose for which the cars are used, and the effect of using them upon the other and ordinary uses of the streets, and upon the use of the adjoining land. Chancellor Green, in *Hinchman v. Paterson Horse R.R. Co.*,³ said the use of land for a steam railway and the use of it for an ordinary highway were almost wholly inconsistent with each other, but with respect to the street railroads used as a part of the highway and in connection with it, he said the use of the land is almost identical with that of the ordinary highway, and went on to show that the use of the railroad could not interfere with the land-owner in the use of his property any more than an ordinary highway.

Chancellor Zabriskie, in *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co.*,⁴ referred to this and many other cases distinguishing street railroads from the ordinary railroads operated by steam. He said that steam railroads did not afford

an obstruction to the convenient access to the complainant's house, compensation must be paid. *Street Railway v. Cumminsville*, 14 Ohio St. 524; *Railway Co. v. Lawrence*, 38 Ohio St. 41. In Mississippi it has recently been held that a horse railroad is a new burden and entitles the abutter to compensation. *Theobold v. Louisville, etc., R'y Co.*, 66 Miss. 279, 14 Am. State Rep. 564, Apr., 1889. For cases on horse and steam railways in streets, see notes 14 Am. St. Rep. 569, and 11 Am. St. Rep. 682; 36 Am. and Eng. R. Cas., n. 9; 38 *ibid* 452, n. 468, n.; 4 Sawyer, Rep. Ann. 623, n.; 32 Am. and Eng. R. Cas. 351, n. For an article on the right to construct and operate an elevated steam railroad on the other side of the street, see 27 Am. Law Reg. N. S. 1; and see also *Penna. R.R. Co. v. Lippincott*, 116 Pa. St. 472.

¹ 2 Dill. Mun. Corp., 4th ed., § 722, and cases cited; Lewis on Em. Dom., sect. 636; *The People v. Kerr*, 27 N. Y. 188 (1863); *Craig v. Rochester City & B. R.R. Co.*, 39 N. Y. 404 (1868); *Kellinger v. Forty-Second St., etc., R.R. Co.*, 50 N. Y. 206; *Story v. N. Y. El. Ry. Co.*, 90 N. Y. 122; *Lahr v. Met. El. Ry. Co.*, 104 N. Y. 268; *Reichert v. St. Louis & S. F. R. Co.*, Arkansas, June, 1889, 5 Lawyer's Rep. Ann., 1883, referring to many cases.

² *Hinchman v. Paterson Horse R.R. Co.*, 17 N. J. Eq. (2 C. E. G.) 75; *Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co.*, 20 N. J. Eq. (5 C. E. G.) 61; 2 Dill. Mun. Corp., §§ 725 (576), 722 (573); *Hobart v. Milwaukie City R.R. Co.*, 27 Wis. 194 (1870); s. c. 9 Am. Rep. 461; *Ford v. Chicago & N. W. R.R. Co.*, 14 Wis. 616; *Springfield v. Conn. River R.R. Co.*, 4 Cush. 63.

³ 17 N. J. Eq. 75.

⁴ 20 N. J. Eq. 61.

access to the land along which they pass, and that the land-owner whose land was taken acquired more of the benefits of a public highway to his land from the use of land for such a railroad, but that in the case of street railroads it was different. In general, he said : —

The cars will stop in front of every door, and convey persons from any one point on their line to any other to which they may desire to go, and the great use or advantage of them is to those whose property is taken for the street and whose lands adjoin it. . . . They are but means of using the public streets to a greater advantage for the very purposes for which they were laid out, free and quick transit from one part to another ; they are the best and cheapest mode yet devised, and they do not hinder the use of the rest of the street for public travel, and hardly, and in a very small degree, obstruct travel on the part occupied by the tracks except the few inches used for the iron rails.

And it was held that the State, or those to whom it has delegated the authority, has the right to set apart a certain portion of the street for a street railroad, if that road is to accommodate the public travel for which the street was designed.

It is worthy of note that before it was learned by experience that the use of the steam railroad in the streets was in fact exclusive, and was not consistent with the ordinary uses of a street, it was held in New Jersey that even this was only a new mode of travel to which the streets might be devoted. Chancellor Williamson, in his remarkable judgment in *Morris & Essex R.R. Co. v. Newark*,¹ in 1855, said : —

While [the land] is preserved as a common public highway, the use of it does not belong to the owner of the fee any more than to any other individual of the community. The Legislature, therefore, does not, by permitting the company to use the public highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misappropriation of the way. It is used in addition to the ordinary mode, in an improved mode for people to pass and repass.

It was only when it was found that the steam railroad running through a town was not a mode of using the streets for travel within the city, that the courts held that it was not a use for which the streets had been dedicated, and that although the right to use

¹ 2 Stock. 352.

it so might be granted, compensation must be given to the land-owner.

Horse railroads having been held to be within the uses of a street, and steam railroads not, the question next arose whether the use of steam motors on street railroads imposed a new burden, and this was variously decided according to the views of the courts upon the effect of such a change upon the use of the streets. In Iowa, for example,¹ it was held that steam motors authorized by a city to be used on the streets were a nuisance, and that the city was liable to a traveller for damages. In Minnesota, on the other hand, it was held² that the running of cars drawn by steam motors enclosed in cabs was a proper use of the streets in aid of public travel, and did not impose a new servitude.

The same thing was held in a case in Maine,³ when the court said: "The motor is not the criterion; it is rather the use of the street. A change of motor is not a change of use."

In *Williams v. City Electric Railway Co.*, in the U. S. Circuit Court for the District of Arkansas,⁴ it was held that a railroad operated in a city by steam motors was a street railway, within the meaning of a statute giving cities power to provide for the operation of street railways, and that it did not impose a new servitude. The court said: "The distinction attempted to be drawn between animal and mechanical power as applied to street railroads is not sound. The motor is not the criterion. It is the use of the street and the mode of that use;" and that if a railroad, whether operated by horse power or mechanical power, is in fact so operated as to be a nuisance, the land-owner has his remedy.

In Tennessee it has recently been held that the use of a steam motor drawing cars and running along a city street and five miles out into the country was, in fact, a new servitude. The court said that it was a question of degree, and depended on the manner in which the streets were used; but that in this case there was noise and smoke, the trains were longer and heavier, and the speed was greater than in the case of horse cars, and the use was practically inconsistent with other uses of the highway.⁵

¹ *Stanley v. Davenport*, 54 Iowa, 463.

² *Newell v. Minneapolis, Lyndale, & M. R'y Co.*, 35 Minn. 112, 59 Am. Rep. 303.

³ *Briggs v. Lewiston & A. Horse R.R. Co.*, 79 Me. 363 (1887).

⁴ 41 Fed. Rep. 556, March 26, 1890.

⁵ *East End R'y Co. v. Doyle*, 13 S. W. Rep. 936.

In New York the question arose with reference to the use of the cable as the motive-power in a case in which it was one of the conditions of the grant that no steam should be used, and the court held that the franchise did not include the right to excavate and use the streets for a cable road.¹

The use of the overhead system of electric wires presents some different questions from the use of steam motors or cables. It involves some obstruction of the streets by the poles and wires, and the alleged interference with the working of the telephone. The poles must be set up either along the sidewalk or in the middle of the street, and the wires must be strung along, and in some places across, the street. It is strenuously objected that the placing of the poles in the soil of the street is a taking of private property, and that even if the fee of the street is in the city, it is an interference with the easement of the abutting owner and his right of access. It must be borne in mind that the question is not whether the poles interfere with public travel and thus constitute a public nuisance. This is a question to be decided by the Legislature. If the Legislature decides that the interests of public travel are subserved by having the poles in the streets, then the public have no ground for complaint. The only question now is whether the private rights of the abutter are affected; whether it is a private nuisance to him, and whether his lands are taken or his rights on the street infringed. In deciding this question it is to be remembered that the land used is a public street, and that whether the fee is in the abutting owner or in the public, the whole beneficial use of the land is in the public for the purposes of a street. For those purposes it belongs wholly to the public; and so long as it is used for those purposes, it does not belong to the individual at all.

The abutter retains only his easements of light and air and access, and these are property rights; and for the loss of these, it has been recently decided in the New York Elevated Railroad cases he is entitled to compensation.² It would seem to follow from this that if the use of cars for local travel, propelled by electricity, is a proper use of the street as such, then the occupation

¹ *People v. Newton*, 112 N. Y. 396 (1889).

² *Story v. N. Y. Elev. R.R. Co.*, 90 N. Y. 122; *Lahr v. Metrop. Elev. R.R. Co.*, 104 N. Y. 268; *Pond v. Metrop. El. R'y Co.*, 112 N. Y. 186; *Haynes v. Thomas*, 7 Ind. 38; *Crawford v. Delaware*, 7 Ohio St. 459; *Stack v. East St. Louis*, 85 Ill. 377; and many other cases. See also an article on the Elevated Road Litigation, by Edward A. Hibbard, 4 Harv. Law Review, 70.

of the soil for poles reasonably necessary to supply the electricity is not a taking of land belonging to the abutting owner, and that it does not interfere with his rights in the street, unless it appears that it is such a perversion of the use of the street as to affect his beneficial use of it as a street in connection with his land, and that it does in fact affect his access to his premises, or obstruct the light or air. In the elevated railroad cases it was held that the erection of a heavy iron railway upon posts in the streets was not a taking of the land, but that it did in fact affect the use of his land in connection with the street, and was an interference with the right of access and of light and air, which entitled the adjacent owner to compensation.¹ It becomes, therefore, a question of fact whether the electric railroad is a mode of using the street for the purposes for which it was designed, and whether the poles and wires really and substantially affect the use of the adjacent land and interfere with the right of access and light and air.

It would seem to be very clear that the use of electricity instead of horses to propel street cars used for the same purposes as horse cars does not change the use of the streets. The cars are of the same kind; they are used in the same way for taking people from door to door, and facilitating travel in and about the city. The use of the road corresponds exactly with the description of a horse railway in the New Jersey cases above cited, as distinguished from a steam railway, which occupies the streets for another purpose, to the exclusion of local travel. The question whether the poles and wires interfere with the use of the street as such in connection with the adjacent land is a question of fact to be determined in each case, but it cannot be said without proof that the poles and wires as ordinarily arranged would have that effect. The most serious opposition is made to those placed in the middle of the street ; but however inconvenient these may be to the public, it is clear that they are less open to objection from the land-owner than those on the sidewalk, in which, by custom at least, the land-owner has more privileges, and on which he is allowed to place obstructions, such as awning-posts and hitching-posts, for his own convenience. The land itself occupied by the electric poles in the middle of the street belongs to the public for the uses of the street, and if the pole is put there for such a use, nothing belonging to

¹ Story *v.* N. Y. El. R.R. Co., 90 N. Y. 122; Lahr *v.* Metrop. El. R'y Co., 104 N. Y. 268; Pond *v.* Metrop. El. R'y Co., 112 N. Y. 186.

the abutting owner is actually taken. Such seems to us to be the conclusion to be reached upon legal principle, and such is the conclusion of the judges in many of the cases which have recently been decided in regard to electric railways, and especially that of Vice-Chancellor Van Fleet in *Halsey v. Rapid Transit R'y Co.* above referred to.

We shall now refer briefly to the recent cases. Many of them are decisions of local and inferior courts, but some of these bear evidences of careful examination of the principles and authorities, and they are all interesting as the beginnings of the application of the principles to new conditions.

One of the earliest cases was *Mount Adams and Eden Park Inclined Railway Co. v. Howard Winslow et al.*,¹ in the Circuit Court of Hamilton County, Ohio, in the year 1888. In that case it appeared that poles were placed along the margin of the sidewalk about one hundred feet apart, and wires were stretched across and along the street for the purpose of supplying electricity to street cars. The court held that the sidewalk was a part of the highway, and to be dealt with as such; that the margins of sidewalks have for centuries been appropriated for placing shade-trees, lamp-posts, hitching-posts, and similar structures, and that these new poles did not, in fact, obstruct the access to the plaintiff's land and imposed no new burden upon it; that the electric current used was not dangerous; that the use of the street by the electric cars was substantially the same as that by horse cars, the mode of travel being the same, the only change being in the motive-power. The court refused to order the poles to be removed. This decision was quoted and approved by the Court of Common Pleas for Cuyahoga County, Ohio, in *Pelton v. East Cleveland R.R. Co.*, January, 1889.² The court said that the question of speed and of danger to travellers on the street might safely be left to the municipal authorities, and that although the poles added nothing to the beauty of the street, yet the burden or obstruction created was more fancied than real, and that it could not be said in seriousness that the poles and wires would, if properly placed, obstruct the light and air or interfere with the ingress and egress to and from the plaintiff's land. An injunction was refused. This case came before the Circuit Court of the same county on appeal, and upon a supplemental

¹ 3 Ohio Circ. Ct. Rep. 425.

² 22 Weekly Bulletin and Ohio Law Journal, 67.

petition alleging that the running of the cars made a great deal of noise and danger, that the electric current was dangerous and not under control, and that the whole system was a public nuisance and should be abated. The court held that there was a question on the evidence whether the noise was greater than that of horse cars; but that it was different and people were not accustomed to it, and that as a mode of using the streets it was subject to regulation by the Common Council; that the danger from speed was also a matter for the Council to regulate, and, as to the electricity itself, the weight of evidence was that the current used was not very dangerous. The injunction was refused.

The first decision by the Supreme Court of a State seems to be that in *Taggart v. The Newport St. R'y Co.*, already referred to.¹ This was decided January 25, 1890, and the opinion was read by Chief Justice Durfee. A bill was filed by owners of abutting land to restrain a street-railway company from erecting poles and wires in front of their houses for the purpose of carrying an electric current to propel the street cars. The poles were to be placed one hundred and twenty feet apart, and along the margin of the sidewalks. The act of incorporation of the company provided that the road might be operated "with steam, horse, or other power, as the Councils of the city might from time to time direct." The permission of the Council to use the overhead electric system had been given by ordinance. The court held that the right to use electricity might be inferred from the words of the charter, and that this was probably meant by the words "other power," in an act passed in the year 1885; that the poles did not encumber the streets, within the meaning of a clause in the charter forbidding the encumbrance of any portion of the street not occupied by the tracks; and, lastly, that street railways operated by electricity by means of poles and wires do not constitute an additional servitude upon the land. The court said it was well settled that an ordinary steam railroad does impose a new servitude, and that a horse railroad does not; that, although the distinction is often stated as a distinction between steam and horse railroads, it properly rests, not on any difference in motive-power, but on the different effects produced by them respectively on the highways and streets which they occupy. It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the

¹ 19 Atl. Rep. 326.

criterion. A steam railroad comes into serious conflict with the usual modes of travel, whereas an ordinary street railway, instead of adding a new servitude, operates in furtherance of the original uses of the street. The danger from the electric current, or from the frightening of horses, does not appear to be sufficient to create a new servitude.

In answer to the suggestion that telegraph and telephone poles and wires have been held to constitute a new servitude, the court said that these are not used to facilitate the use of the street for travel and transportation, or if so, very indirectly so, "whereas the poles and wires now in question are directly ancillary to the uses of the street as such, in that they communicate the power by which the street cars are propelled;" and the Chief Justice alluded to the significant fact that telegraph lines erected by a railroad company within its right of way to increase the safety and efficiency of the railroad were held not to be a new burden, but only a legitimate development of the easement already acquired. The injunction was refused.

After this came several more decisions of inferior courts. There is an amusing one by Judge Reilly, of the Circuit Court of Wayne County, Michigan, who narrates his personal experience in driving his own horse and meeting an electric car in that very street the week before, and yet decides that the danger is not serious, and that there is no change in the mode of occupation of the street and no new servitude imposed.¹ The subject was discussed in all its aspects in a long opinion by Toney, J., of the Louisville Law and Equity Court, on June 30, 1890.² The court cited the late cases above referred to and quoted Cicero, but especially the opinion of the Supreme Court of Rhode Island, and decided that an injunction should not have been granted at the suit of the owner of a factory on the line of the street.

In *Lonergan v. Lafayette Street Railway Co.*, decided by the Circuit Court at Lafayette, Indiana, July 9, 1890, it appeared that the statute under which the defendant company was organized provided for the incorporation of any "street or horse railroad company for the purpose of constructing street or horse railroads through the streets of the cities and towns" of Indiana. The act was entitled "An Act to provide for the incorporation of street

¹ *Detroit City R'y Co. v. Mills*, Circuit Court, Wayne Co., Mich., 1890.

² *Louisville Bagging Manufacturing Co. v. The Central Passenger Railway Co.*

“railroad companies,” and was passed in 1881. The city gave the company license in 1882 to operate their road by horse or electrical power. The court held that the Legislature must be supposed to have contemplated new discoveries and inventions, and that they must not be understood as meaning to exclude the new and useful appliances that might be invented, and that the language of the act was broad enough to cover a street railroad, whether the cars are drawn by horses or propelled by electricity. It was held also that there was no change in the use of the street, and that neither in this, nor by reason of danger and noise, was there a new servitude imposed upon the land.

The latest decision on the subject, so far as we know, is that of Vice-Chancellor Van Fleet, of New Jersey, from which we have quoted already. The case is *Halsey v. The Rapid Transit R'y Co.*, Court of Chancery, N. J., Dec. 6, 1890, 20 Atl. Rep. 859, to appear in 47 N. J. Equity Reports. The company was organized under a general law, passed in 1886, “to provide for the incorporation of street railways and to regulate the same.” Nothing is said in the act about the kind of motive-power to be used. This general grant was of itself sufficient, the court said, to include electric power, and the decision on this point has been quoted already. There was, however, other legislation. A statute had been passed authorizing any street railroad to use electric motors, with the consent of the city. Such consent had been given by resolution specifying the overhead system, and providing for poles either on the sides or in the middle of the street, every other pole in the middle of the street to be furnished with a group of incandescent lights. The railroad company was about to put up poles one hundred and twenty-five feet apart, in the middle of the street, in front of the complainant's tannery. The bill was filed for an injunction, and it was insisted that the resolution of the Common Council went beyond the statute in authorizing the use of poles, and that the poles occupied land belonging to the complainant and interfered with his easements in the street, for all of which he was entitled to compensation, which not being provided for, the acts of the company were unlawful.

The Vice-Chancellor held that the overhead system was included in the legislative grant; that the testimony of Thomas A. Edison and other witnesses showed that this was the best electrical system.

and the only one which as yet has proved successful, and that the poles and wires are in the present state of the art necessary to the successful operation of the defendant's railway by electricity.

They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. . . . The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden upon the land, but must, on the contrary, be regarded both in law and reason as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem, then, to be entirely certain that the occupation of the street by poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired.

The Vice-Chancellor cited with approval the cases above referred to in Rhode Island, Kentucky, Ohio, and Indiana, and in the Federal court, and said the question where there was a new burden

Must be determined by the use which the new method makes of the street, and not the motive-power which it employs in such use.

And this principle, he said,

Exhibits in a very clear light the reason why it has been held that telegraph and telephone poles do impose a new burden, since they are placed in the street, not to aid the public in their right of free passage, but in the transmission of intelligence; and although streets are used for this purpose in carrying the mails, yet this mode differs so essentially from their general and ordinary use, that the general current of authority, with an exception in Massachusetts, has declared that it does not come within the public easement.

The Vice-Chancellor added, that the poles in the present case served an ordinary public purpose in lighting the streets, and also that with respect to danger from the current, the proofs showed that the current employed might be used with entire safety to everybody. In answer to the contention that the poles ought not

to be placed in the middle of the street, the court said that this part of the street was especially subject to public control, and that the complainant had fewer privileges with respect to it than in the sidewalk, and that the poles were placed in a part of the street of which, so long as it was used as a street, the complainant, by virtue of his title to the fee, could not make any use whatever.

I have quoted from this opinion at some length, but the force of the Vice-Chancellor's argument cannot be fully appreciated without reading the opinion itself.

An application was made to the Supreme Court of New Jersey, before this decision was rendered, for a writ of *certiorari* to review the resolution of the Common Council of Newark, giving permission to the Rapid Transit Railway Co. and the Newark Passenger Railway Co. to set up poles and wires for the electric current; and the whole question of the right to use the streets in this way was argued, and on the part of the defendants it was contended that a *certiorari* was not the proper remedy for the protection of the private rights of the abutting owner. The court allowed the writ without deciding the main question, only remarking that the resolution (which specified the use of poles) seemed to be broader than the statute (which only said electric motors). The writ will bring the whole case before the court at the next or a subsequent term.

It is, of course, impossible to anticipate this decision, and I cannot say that there have not been decisions of which I do not know contrary to those I have cited, but the reasoning of these is based upon well-settled legal principles, and some of them at least are those of courts of general jurisdiction and of judges whose opinions are entitled to the most respectful consideration; and I think I may say that it seems probable that there will be a general agreement that the overhead electrical system may be used by legislative, even if not of municipal authority, in the operation of street railways, without giving compensation to the owners of abutting land.

(3.) The remaining question suggested for discussion was whether the disturbance of the telephone currents was a sufficient ground for injunction against the use of the more powerful current in the streets for the propulsion of the cars. It is on this ground that the railroad companies have met with the most determined opposition, but I can only refer briefly to some of the cases in which the matter has been discussed.

The conflict arises from the fact that both the telephone and the electric railway use the earth for the return current required for the use of electricity. It does not seem to be certainly known whether the disturbance is due to what is called "leakage," and takes place in the return current in the earth, or whether it is caused by induction between the parallel wires in the air. In either case the current used for the cars is stronger than that used for the telephone, and overcomes it. Whether the disturbance is caused by leakage or induction, there seems to be no doubt that it could be prevented by the use of a parallel return wire by either party; because in this case the induction would be neutralized, and the earth would be used for only one return current. The owners of the telephone say that they have set up their wires by public authority, and are using their instruments in a useful and profitable business, and insist that they should be protected from an interference with their current which will cause them serious damage. They insist that the railways might use a return wire and what is called the double trolley, and ask that they be enjoined from using the earth for their return current. The railways, in reply, ask if the complainants "want the earth" for their exclusive use, and insist that they too can use a return wire, and that by the use of the McCluer device they can do so with less expense than the railroads could do so, and that it is not a case in which the courts should interfere, but that it should be left to the development of electrical science to provide a remedy. The subject has been discussed before boards of aldermen and railroad commissioners, before a committee of the Senate of the United States, and before the courts; a great deal of testimony has been taken, and many arguments have been made. I can only allude to a few of the decisions of the courts.

In *Central Union Telephone Co. v. The Sprague Electric R'y, etc., Co.*, Court of Common Pleas, Summit Co., Ohio, it was held that since it was uncertain whether the railway could use a return wire, and appeared to be probable that the telephone company might obtain relief in that way, the cost of this device would be their measure of damages, and an injunction would be refused. A similar decision was made in June, 1889, in the Chancery Court of Hamilton Co., Tennessee, and a bond in the sum of \$10,000 was required of the defendant to secure the payment of the damages.

In the Rock Mountain Bell Telephone Co. *v.* The Salt Lake City Railway Co., in the District Court for the Third Judicial District of Utah, July 23, 1889, an injunction against a street railway company was denied by Zane, J., on the ground that it did not appear clearly from the affidavits that the electricity used by the railway company would injure the telephone company if the wires of both were properly insulated so as to prevent leakage, and that it could not be determined on the affidavits whether it was practicable for one or both to insulate them. The same case came before the same judge in the December term, 1889, on final hearing, and he denied the injunction on the ground that the telephone company could protect itself by the use of the McCluer system of return wires for the telephone circuit, which, although very expensive, appeared to furnish a more perfect service. He said the court would not enjoin the use of the earth by the defendant for a return current so long as the plaintiff continued to use it, especially as it did not appear to be established that it was practicable for the defendant to give it up. In Wisconsin Telephone Co. *v.* Eau Claire Electric Street Railway Co. *et al.* in the Circuit Court of Eau Claire County, Wisconsin, January 29, 1890, an injunction was denied for similar reasons. In East Tennessee Telephone Co. *v.* The Knoxville Street Railway Co., in the Chancery Court of Knox County, Tennessee, an eloquent opinion in favor of the electric railway was delivered by Chancellor Gibson, April 21, 1890. His decision was based chiefly upon the principle that the people of Knoxville, who authorized the operation of the railway, had rights superior to any telephone monopoly of the earth and the air for electrical purposes.

On the other hand, in The City and Suburban Telegraph Association *v.* The Cincinnati Inclined Plane Railway Co., in the Superior Court of Cincinnati, February 12, 1890, an injunction was granted against the railroad company, on the ground that the telephone company had acquired a right to use the streets, and had invested money on the faith of the enjoyment of the present mode of operating their franchise, and that the defendants had no right to disturb them, unless they could show that there was no other way in which they could enjoy their franchise to run an electric railway. If by using the double trolley, no matter how expensive it might be, the injury could be avoided, the defendant had no right to ask the plaintiffs to employ a new device.

The disturbance consisted, the court said, in a buzzing noise which had been so loud and continuous that communication over the telephone lines had become impossible. Telephones several miles from the city had been affected by it, and altogether more than two hundred lines had suffered from it to a greater or less degree. The cause of the trouble was described as twofold,—first, the escape of the electric fluid from the rails, which is called earth distribution or leakage, and affects the earth connection of the telephone wire; and, secondly, induction between the parallel wires of the telephone and the railway, by which the variations in the current in the latter cause variations in the current in the former. The court said it seemed from the evidence that about one half of the disturbance in the present case was due to one cause, and one half to the other, and that the result in either case was a great disturbance and a serious loss. Conceding that the injury from either cause might be wholly obviated if the telephone company should use a complete metallic circuit, so as not to use the earth and to neutralize the induction, the court held that the company was not obliged to go to the great expense which this would involve, nor even to adopt the McCluer device of using a large return wire instead of the earth in the disturbed district, unless it was shown to be impractical for the railroad company itself to use a return wire and a double trolley; and this, the judge said, was not shown, but, on the contrary, there appeared to be no serious objection to it except the expense. The defendant was using electricity in such a way as to inflict an injury upon the plaintiff in the lawful use of its telephone system, and was subject to an injunction against the nuisance.

This decision was affirmed by the General Term of the Superior Court in December, 1890,¹ Hunt, J., dissenting. The court said:—

We take the rule to be that where a specific power is granted to do a certain thing, and that there is but one way to do it, then under the 10 Ohio St. case it cannot be considered a nuisance; but when it can be done in two ways,—one causing no injury, and the other causing injury,—then, under the 23 Ohio St. case, it would be considered a nuisance if done in the way which would cause the injury.

¹ 24 Weekly Law Bulletin & Ohio L. J., 471. The dissenting opinion was printed in the Cincinnati Commercial Gazette, Dec. 25, 1890.

The defendant used the Sprague system, by which the earth and the rails formed the return circuit. The court asked whether there were any other system which would not cause hurt, and which could be used with equal efficacy, and said it is clear that the double trolley system with the metallic circuit would prevent the disturbance, but it is objected that it cannot be used with equal efficacy and is too expensive. To the first objection, the court answered that the double trolley had been used in Cincinnati on a double-track railroad and was practicable, and as to the second, that the court would not listen to any argument on the ground of expense when it restrains the doing of a wrong,—citing Lord Hatherly in *Atty.-Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 158. In regard to the double trolley, the court quoted and distinguished the decision of Judge Brown in *Cumberland Telephone & Telegraph Co. v. United Electric Co.*, in the U. S. Circuit Court for the Middle District of Tennessee, May 19, 1890,¹ and showed that the judge conceded that in double-track roads the double trolley might be made a success. In this case the decision was that if it were shown that the double trolley would obviate the injury to the complainants without exposing the defendants or the public to any large expense, it would be the duty of the defendants to adopt it; but as the proofs showed that a more effectual and less expensive remedy is open to the complainants, the telephone company ought to adopt it, and was not entitled to indemnity from the railway company.

The case was decided by Judge Brown, now one of the Justices of the Supreme Court of the United States. He said it was not denied that there was serious injury to the telephones, but that it must be borne in mind that the science of electricity is still in its experimental stage; that a device which is to-day the best, cheapest, and most practicable, may in another year be superseded by something incomparably better fitted for the purpose; and that it is quite possible that the legal obligations of the parties may change with the progress of invention, and whichever party, by the adoption of a new device, could obviate the difficulty might be obliged to do so, leaving the question of expense and damages to be settled by the courts; and we must therefore consider the case with reference to the present state of the art, and with the possibility that in another year circumstances may so

¹ 42 Fed. Rep. 273.

change as to reverse completely the obligations of the parties. After describing the various devices which might be used by the railway and the telephone to obviate the difficulty, he cited cases in regard to nuisances and the obligation to use property so as not to injure the property of a neighbor, and said:—

The substance of all the cases we have met with in our examination of this question—and we have cited but a small fraction of them—is that where a person is making a lawful use of his own property, or of a public franchise, in such manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. . . . Unless we are to hold that the telephone company has a monopoly of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained.

There was also a decision in favor of the telephone company in the case of the Wichita and Suburban Railway Co., in the District Court of Sedgwick Co., Kansas, June 29, 1889.

The same question came before the Supreme Court of New York, in Albany County, in Hudson River Telephone Co. v. The Watervliet Turnpike & Railroad Co., on application for preliminary injunction, and Mayhem, J., granted an injunction *pendente lite* without prejudging the merits of the case, and on the plaintiffs executing a bond for \$10,000. On appeal to the General Term the injunction was continued on February 24, 1890, for thirty days, and until the defendants should stipulate that the court might determine, on the final hearing, what would be the necessary expense to the plaintiffs of preventing, by metallic circuit or otherwise, the injury to, or interference with, their telephone, and what damage the plaintiffs would sustain, and should give bond to pay the damages. An appeal from this order was taken to the Court of Appeals, and on June 3, 1890, this court, through Judge Andrews, delivered an opinion, declining to entertain the appeal, on the ground that the granting of an injunction *pendente lite*

rests in the sound discretion of the court of original jurisdiction. The court said, however,—

We have examined with care the questions involved in this case, and we are compelled to say that we entertain grave doubts whether, upon the facts stated in the complaint and affidavits, any cause of action exists in favor of the plaintiff, and whether the plaintiff has any remedy for the injury of which it complains, except through a readjustment of its methods, to meet the new condition created by the use of electricity by the defendant under the system it has adopted.

A decision on the merits was reserved until after the final hearing. All concurred except Finch and Peckham, JJ., who were in favor of a reversal of the orders. The report of the referee, Mr. Isaac Lawson, was made on August 6, 1890, and his decision was in favor of the defendants. He found as matters of fact that the plaintiffs could obviate the difficulty to some extent, but not wholly, by adopting the McCluer system; that it could obviate the difficulty entirely by making each of its circuits a metallic one; that the defendants could obviate all the damage by adopting the double trolley or the storage battery, and that this would cost less than it would cost the plaintiff to adopt the complete metallic circuit; and yet he held as a matter of law that the plaintiffs had failed to establish a cause of action against the defendants.

It appears from this review of the cases that the contest between the electric railway and the telephone companies over the use of the streets has not yet been definitely settled by the courts, and it seems likely that the settlement will be made through the ingenuity of inventors rather than by the efforts of the lawyers and judges. It is quite certain that public convenience will demand that the streets shall be used for both purposes, and that some way will be found by which this may be done. In the mean time, it is the duty of the courts to protect existing property from unnecessary injury without needlessly obstructing the application of such a valuable force as electricity to new uses for the public benefit. It is certainly true, as the courts generally have held, that no one mode of public service has the right to a monopoly of the earth or the air in the line of the streets in the use of electricity, and the power of injunction will only be exercised so as to avoid present injury to existing property until practical men have found a way for all to work together in

harmony. Whether the power will be exercised even to this extent is not yet settled, and it may be that the courts will decide that every one using this force in the public streets must exercise ingenuity to protect himself from the effect of the use of the same force for lawful ends and by lawful means, only insisting that each must use the best appliances practically available and avoid negligence and wanton injury.

With respect to this conflict with the telephone companies, and also that with the land-owners, it may safely be said, in the light of experience, that the new methods of using the streets will prevail, and that the courts may be trusted to protect the substantial property rights of individuals, even though they may not assure them against the inconveniences of living in a very busy world.

Edward Q. Keasbey.

NEWARK, N. J.

LAND TRANSFER REFORM.

THE AUSTRALIAN SYSTEM.

SCARCELY had our ancestors first planted their infant settlements on the shores of Massachusetts Bay when they were brought face to face, with a problem still unsolved by us, how to provide a safe and practicable system of registration "for avoyding all fraudulent conveyances, & that every man may know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deale in."¹

On the first of April, 1634, less than four years after the arrival of Governor Winthrop with the Colony Charter, the General Court ordered that the constable and four or more of the chief inhabitants of every town should make "a surveyinge of the howses" and lands of every free inhabitant, and should "enter the same in a booke, (fairely written in words att lenght, & not in ffigures,) with the sefull bounds & quantities, by the neerest estimaçon" and should "deliuer a transcript thereof into the Court" within six months then next ensuing, and that the same so entered and recorded should be "a sufficient assurance to efly such ffree inhabitant, his & theire heires and assignes, of such estate of inheritance, or as they shall haue in any such howses, lands, or ffranckenem's."² No little difficulty seems to have been experienced in

¹ Mass. Col. Rec., I., 306.

² Mass. Col. Rec., I., 116. It was probably in compliance with this order that the Boston Book of Possessions was compiled. Oct. 27th, 1636 (Mass. Col. Rec. I., 182), "Newe Towne p'sented a booke of their records vnder the hands of Will: Andrews, constable, John Beniamin, & Will: Spencer." June 4th, 1639 (*Ibid.*, I., 266), the court ordered that "All townes had respit to bring in the transcripts of their lands vntill the next Courte." Dec. 3d, 1639 (*Ibid.*, I., 284, 285), Concord, Lynn, Dorchester and Weymouth were fined five shillings each "for not giveing in a transcript of their lands." Nov. 11th, 1647 (*Ibid.*, II., 224), Springfield was ordered "within twelue months, to bring in a transcript of their land, according to ys law in that case p'vided." May 26th or 31st, 1652 (*Ibid.*, III., 275; IV. (part 1), 90), in the matter of the Sudbury Records the order of the court was as follows: "Whereas in times past, before the Courtes were kept in *in* Middlesex, the records of the lands of the severall townes within that county were kept in Boston, vpon the request of the deputy of Sudbury, in the behalfe of theire towne, it is ordred, that the secretary shall deliuer the booke of records of lands, sales, alienations &c. to the deputy of Sudbury, which concernes that towne, that so they may deliuer the same to the recorder of theire owne county."

putting the new system into operation, for the General Court, March 4th, 1634-35, "agreed, that the order made in Aprill 1634," should "forthwith be putt in execucon,"¹ and on the first of August, 1637, ordered "That some course bee taken to cause men to record their lands, or to fine them that neglect."² There was much merit in this plan. It provided for double registration Land records were to be kept in every town, while a transcript was to be placed in the office of the Secretary of the Colony. It was analogous to the system in use in England in the matter of Ecclesiastical Records, that of Parish Records and Bishops' Transcripts. Double registration of deeds in both town and county has advocates even to-day in this Commonwealth. Whether this last scheme, if we take into consideration its greater cost as well as the vast increase in the bulk of the records, is now practicable may be doubted, but it would be invaluable in case of the destruction by fire or otherwise of either set of records.³

At a General Court held in Boston 7th day 8^{mo}, 1640, it was ordered that "no morgage, bargaine, sale, or graunt hearafter to bee made of any houses, lands, rents, or other hereditaments, shalbee of force against any other person except the graunter & his heires, unlesse the same bee recorded, as is hearafter exp̄ssed;" and further, that such instruments should be recorded at Ipswich and at Salem for lands within the jurisdiction of those courts, "& all the rest to bee entered" by "the recorder at Boston."⁴

This created three registration districts for the whole Colony, but in 1641-42 it was ordered that the "Clerke of every Shire Court"⁵ should record all such instruments. It was not until 1643 that the first division of the Colony into counties was made, and not until 1650 that the General Court ordered that "henceforth any graunt, sale, bargan, or morgage of howses, lands, rents, or other hereditaments, recorded by the recorder of y^t shire in which such howses, lands, rents, or hereditaments are, shalbe sufficient securitie vnto the purchaser, or grauntee, without any further cer-

¹ Mass. Col. Rec., I., 137.

² *Ibid.*, I., 201.

³ All the records in the Registry of Deeds, part of the Probate Records, and all the files of the Probate Court for the County of Barnstable, were destroyed by fire Oct. 22, 1827. All the Probate Records for the County of Cumberland, which, although now in Maine, was formerly a part of Massachusetts, were consumed in the great Portland fire of July 4, 1866. The records of several towns and parishes in this Commonwealth have also been totally destroyed in the same way.

⁴ Mass. Col. Rec., I., 306, 307.

⁵ Mass. Col. Laws, Edition 1660, p. 21.

tifyinge vnto the recorder or secretary for the Generall Courte; and that clause in the close of the printed law, title Conueyances Fradulent, page 14, requireinge the same, is hereby repealed."¹

These extracts from the Colony Records show the gradual development in this Commonwealth of the plan of recording conveyances of land, and the County system so established is in operation to this day. For the first two centuries the records increased but slowly, and it answered fairly well, but since then the growth has been enormous. For instance, in the County of Suffolk, nineteen books sufficed for all deeds and other instruments left for record prior to A. D. 1700. On the first of January, A. D. 1800, the number had risen to only 193. At the end of the year 1890 there were in the Registry of Deeds more than ten times that number of books, — *i. e.* 1,974. — huge folio MS. volumes containing, most of them, 640 pages each. These are the statistics for a single county. In the three counties of Suffolk, Norfolk, and Middlesex there are more than 4,500 volumes, while in all the counties together the aggregate is more than 10,000 volumes, and to this great number additions are continually being made. Nearly 24,000 deeds and other instruments were left for record in the County of Suffolk alone during the past year.

These figures are certainly appalling, and we may well pause to ask where will this end, and what will be the condition of affairs a generation hence, if this rate of increase holds. Yet everything tends to show that even this rate will be far surpassed in the near future. The extraordinary growth of the country in wealth and population has already rendered necessary some other method of land transfer. It is evident that the present system, cumbersome and unwieldy at best, is fairly breaking down of its own weight. In fact, the whole system is defective, and is open to many obvious objections. It necessitates long and exhaustive searches of a mass of records which are continually becoming more and more enormous, the tedious preparation of abstracts, disputes over titles, difficulties, delays, expense, examinations and re-examinations without end. Speaking of this system of registration of deeds, Lord Cairns pronounced "the objections to a register of deeds to be so manifest that hardly any person in the present day would venture to propose it. It would not simplify title in the least. It only puts on a formal record the whole of that multitude of deeds

¹ Mass. Col. Rec., III., 203; IV. (pt. 1), 22.

and conveyances, of the extent and complexity of which we have already so much reason to complain." Moreover, so far from affording security against fraud, it actually opens the door to new and distinct species of fraud.

But it has been reserved for another branch of our race, while engaged in carrying the light of English civilization into another continent, under conditions of life not unlike those with which we ourselves have had to contend, to solve the problem which has hitherto baffled us here, and it is to Australia that we must look for the first establishment among English-speaking people of an absolutely safe and practicable system of registration.

The difference between the two systems is fundamental. Here we have registration of deeds; in Australia, not registration of deeds, but registration of titles. There it is not on the execution and delivery of an instrument, but upon the entry in the Register, that the title passes. The Australian system avoids, as its originator, the late Sir Robert R. Torrens, truly says, "the accumulation of instruments with voluminous indexes, the fatal objection to other systems." Registration under the Real Property Act is not compulsory, but optional. No one is obliged to register his title, but having once made choice of the new method, he cannot afterward convey his property by deed. It is "under the Act," as it is called. The course of procedure is simple, and is as follows: —

In Australia the land-owner who wishes to avail himself of the benefit of the Act—and it may be repeated that it is entirely optional with him—makes application to the Registrar-General. His application, together with the deeds, other evidences and abstracts of title, with a plan of the land duly certified, are submitted to the official examiners of titles. They proceed to examine the title just as is done here for a purchaser under the old system, and make report to the Registrar-General. If the applicant is found to have a good title, the land is brought under the operation of the Act by the issue of a certificate of title vesting the estate indefeasibly in the applicant. If the title proves to be bad, the application is rejected.

If the applicant is found to be in possession of the land under a good holding title, that is, if he appears rightfully entitled to it, and the evidence is such as to lead to the conclusion that no other person is likely to succeed against him in an action for ejectment,

although the evidence he produces might not be sufficient to compel an unwilling purchaser to take the land, the examiners report the case to the Registrar and recommend that notices be served on all parties in interest, and also upon the owners and occupants of adjoining land, if necessary, and that advertisement be made more or less extensively, as the nature of the case may demand. If no objection be made by filing a caveat within the time prescribed by the Registrar, the land is brought under the provisions of the Act, the certificate granted to the applicant, and an indefeasible title is vested in him.

If a caveat be filed within that time, the Registrar suspends action until it be withdrawn, or until he receives a notice of the final judgment of the Supreme Court upon the question raised.

One great advantage in this method is that it affords a ready way of clearing titles of technical imperfections. Titles, as every experienced conveyancer is aware, are not to be divided into two classes only, the good and the bad. There is a large intermediate class, to which perhaps the great majority of them belong, where the title is good enough for all practical purposes, but where, generally through the stupidity of unskilful scriveners, slight defects, purely technical in their nature, and of no sort of consequence from any reasonable point of view, faint blemishes that a court of last resort would summarily dispose of, have become what are called "clouds on the title." These insignificant defects, when duly magnified by some quibbling examiner, are made to appear formidable enough to the timid investor; but their principal use is to enable the once eager purchaser, whose ardor has suddenly cooled, to refuse to comply with the contract made in good faith for the purchase of the land over which these mysterious "clouds," hitherto not visible to the naked eye, now so darkly and portentously hang. To real-estate owners, who have long suffered from this state of things, the Australian system will prove a priceless boon. If it did only this and nothing more it would be worth all the cost of its adoption here. It would bring into the market estates which are not now salable, and would clear the title once for all from all these "cobwebs of the law."

This certificate issued by the Registrar is not simply a certificate, but an absolute guaranty of title by the Government. A small fee, paid in each case by the land-owner on making his

application, goes to form an Assurance Fund, which is kept invested in Government bonds. This fund, as it is seldom drawn upon, has increased in all of the colonies to large proportions. That the transaction is a safe one for the Government is shown by the fact that for eighteen years not a single claim against it was sustained, either in New South Wales or in Tasmania. As the title is carefully examined, it is not probable that an outstanding interest would be overlooked any more than now under our present system. But if through any mischance such a claimant should afterwards appear, he would have his claim on the fund provided for just such a contingency. This compensation in money payment is more just and equitable than to reinstate him in possession of the land. But in actual practice, experience has shown that such a case is of the rarest occurrence, and this consideration need not delay us.

These certificates are in duplicate. They define the land by description, by reference to officially recognized plans, or where necessary by diagram on the certificate, and set forth the nature of the estate of the applicant, whether in fee simple or not, noting by endorsement all lesser estates, leases, mortgages, or other interests affecting the land at the time. One of these certificates of title is given to the applicant; the other is retained by the Registrar-General.

The official Register is formed by binding together the duplicates of all these certificates so retained by him. Each of these certificates represents a distinct title and constitutes a distinct folium of the Register. In case of sale of the land, the memorial of the transfer may be entered on the existing certificate, or that may be surrendered, and a fresh certificate may be taken out in the name of the purchaser. This will, in its turn, form a fresh root of title, and will occupy a separate folium of the Register.

A registered land-owner may at any time in exchange for his original certificate procure a fresh one from which all mention of mortgages which have been paid off and discharged, and of leases which have terminated, and all other encumbrances which have ceased to exist, are omitted. The Registrar also can require the owner, when his certificate is too much encumbered with such dead matter, to take out a new one free from all such defunct charges.

Land once brought under the Act cannot be conveyed by

deed, but printed forms of contract are provided at the Registry Office and at the stationers' shops. These instruments when executed are valid as agreements between the parties, and are the authority to the Registrar to enter the memorial on the Register; and the entry by him on the folium of the Register appropriate to that lot of land in question, of the memorials of all transfers and charges so created, constitutes Registration. The like entry is also made on the certificate in the hands of the owner, and registered estates are held free of all charges and incumbrances whatsoever, save such as appear on the Register, and endorsed on such certificate. This certificate is conclusive evidence of title.

This duplicate method of conveyancing by Registration of Title is admirably simple and inexpensive. Each separate estate is represented by only one instrument in the hands of the registered owner, and it discloses every incumbrance which it is necessary for any one dealing with him to know. The duplicate being filed in the Registry Office, searches are needless except for the purpose of ascertaining if any caveats have been filed since its date. This is a trifling matter and causes no delay. It is not uncommon for a mortgage to be placed on an estate in the space of an hour at a cost of only a few shillings. Moreover, this duplicate system precludes any possibility of loss in the event of a fire.

It is a great mistake to suppose that the extraordinary success which has attended the introduction of this system into the Australian Colonies is due to the fact that Australia is a new country, and that therefore Registration of Title is not equally suited to the needs of older communities. On the contrary, its originator always claimed that, so far from being an advantage, it was a distinct disadvantage that he was compelled to try it first in Australia. And the reason is obvious. In an old country the land is improved, monuments abound and are fixed and certain, possession undisputed, and titles easily proved. Moreover, in Australia, at the time of the passage of the Act, so far from its being true that the land had recently come directly from the Crown, a large part of it had been in private ownership for sixty years or more, and during that time had been subjected to all the vicissitudes of unskilful conveyancing and presented all the difficulties which usually result from such a condition of affairs. And further, so far from its being an advantage that there was a survey of the Crown Lands

already made, that survey itself was an additional source of error, as it was so inaccurate as to be worse than useless.

The success of Title Registration in Prussia has been just as marked as in Australia, and Prussia certainly cannot be called a new country.

The system has safely passed the experimental stage. It was introduced into South Australia thirty-three years ago; into New South Wales twenty-nine years ago; and it is now in successful operation in eight or nine British Colonies, including British Columbia. A whole generation of men have grown up under it, and it has given universal satisfaction. It is impossible in the brief space allotted to this article to go much into the details of this method, but the practised eye of the conveyancer can see how thoroughly feasible and admirably simple this duplicate method of conveyancing is, and how cleverly it avoids the rocks and shoals and sunken reefs on which our present system has been wrecked.

The Australian System does not necessarily change existing laws. It is simply the providing of better machinery for carrying out those laws. It substitutes a better system of conveyancing, and, by granting indefeasibility of title, gives the land-owner absolute security. In fact, as its originator says, "There is no legitimate object which a land-owner can accomplish under the existing law, which may not be accomplished more readily, more safely, and at infinitely less expense under [the Australian] system," and "by registration of titles security has been established for insecurity, simplicity for complexity, and the cost has been reduced from pounds to shillings."

Moreover, who can tell what influence an expeditious and inexpensive method of transferring land, of converting real into personal property at will, and *vice versa*, may not have had in enabling our kindred to build up in the Southern Hemisphere their rich and prosperous Colonial Empire? The extraordinary development of wealth and population there may in part be attributed to the land-transfer system they were wise enough to adopt.

The whole tendency of modern times is to make the transfer of land as easy and simple as that of personal property. In a commercial age, Feudal ideas as to land are entirely out of place. Cumbersome and antiquated methods of transfer must give way to the needs of the present time. Under the new system, land can be transferred as easily as stock in a corporation. It can be con-

verted into cash, or loans can be obtained on it, without loss of time, and without putting in motion the whole ponderous machinery with which the old system is overweighted. Suppose there should be a sudden panic in the money market, the land-owner by this system could effect a loan on his real estate in an hour while by the present system weeks might pass in tedious examination of title. By that time either the crisis would be over or the owner in insolvency. Ability to turn at once real property into personal is a great power. It adds enormously to the value of land. There is no good reason why real property should not pass from hand to hand just as readily as personal property. And when the American land-owner awakens to a realizing sense of the disadvantages under which he now suffers, as compared with his Australian brother, he will not rest until a thorough and complete measure of Land Transfer Reform is fully established in this country as well as in Australia.

John T. Hassam.

BOSTON.

LAND TRANSFER REFORM.

SUGGESTIONS AS TO THE QUESTION OF CONSTITUTIONALITY.

THE question of a simpler system of land transfer is attracting a good deal of attention. Experience seems to have demonstrated the practicability of such a system. The question which rises first in the mind of an American lawyer with reference to any new mode of dealing with land titles is that of constitutionality,—a question which may not have had to be considered in other countries.

The essential features of the system which prevails in some English colonies appear to be, first, a conclusive recognition of title in a given person at a given date; second, transfer thereafter, not by deed, but by a surrender of certificate and the issue of a new certificate conclusively defining the title of the new taker.

i. The initial registration of a title, or the conclusive establishment of a starting-point.

An official certificate of title, to be of final authority, must cut off all possible adverse claims. Under our system of constitutional limitations, possible adverse rights in land could not be cut off by a mere certificate of a public examiner. A special statute of limitations might be passed, limiting claims adverse to a certificated title to perhaps one or two years. Such a statute, under familiar principles, could be made to apply to existing claims. Another course would be to have the initial registration rest upon judicial proceedings. Action to establish a title conclusively in a certain person against all possible adverse claimants, known or unknown, is no novelty in our States. The principle of it is recognized in most, if not in all, of them. It is recognized in Massachusetts, for instance, in the conclusive probate of wills (Mass. Stat. 1889, c. 435), upon general notice by advertisement to all persons concerned, and more particularly in the proceedings to adjudicate upon the validity of mortgages of over twenty years' standing (Mass. Stat. 1882, c. 237); in proceedings to determine the validity and effect of conditions and restrictions of more than thirty

years' standing (Mass. Stat. 1889, c. 442); and in certain special acts, as, for example, Stat. 1861, c. 308, which provided for the taking of a certain large district in Boston by eminent domain and for an absolute bar to claims not presented within a very limited time. Many other States besides Massachusetts provide for the establishment of facts in land titles by proceedings either against specified classes of unknown persons, as, for example, unknown heirs of a person deceased,¹ or against all unknown claimants, of whatever description.² Some of these States, like Massachusetts, provide only for limited classes of defects; others for defects of every nature. Statutes to this end, when they provide (as of course the English equity procedure did not do) for the operation of the decree upon the land, either directly, *proprio vigore*, or by the intervention of an agent to execute releases in the name of unknown possible claimants, seem to be constitutional and effectual. *Langdon v. Sherwood*, 124 U. S. 74. See also *Cook v. Allen*, 2 Mass. 461; *Crippen v. Dexter*, 13 Gray 330; *Jackson v. Lamphire*, 3 Pet. 280; *Eitel v. Foote*, 39 Cal. 439; *Jackson v. Babcock*, 16 N. Y. 246; *Sullivan v. Weaver*, 10 Ohio 275; *Parker v. Overmann*, 18 How. 140; *Pennoyer v. Neff*, 95 U. S. 714; *Gray, J., Hart v. Sansom*, 110 U. S. 151.

We have, therefore, in our States, recognized principles of legislation, under which it is possible to establish conclusively a starting-point in a land title; and all that is needed in this respect in any given State is the extension of existing legislation.

It has been suggested by a high authority in real-estate law that possibly the State, just as it can take a whole section of a city by eminent domain, for the purpose of changing its grade, for the advancement of the public health, can take parcels of land for the purpose of clearing and registering their titles, selling the land with an indefeasible title, and holding the purchase-money for the real owners. Such a proceeding would ransack the title, like a bankruptcy or a tax sale, and make an indefeasible initial title in the new taker.

2. Subsequent transfers.

The States have the fullest power over transfers of real estate,

¹ N. Y., Civil Code, § 438; Wisc., Rev. Sts., 1878, §§ 3185, 2539, 3195; Minn. Gen. Sts., vol. I. c. 75, §§ 2-8, 32; vol. II. c. 75, § 4.

² Va., Code, §§ 3230, 3233; W. Va., Code, c. 124, §§ 11, 14; Col., Civil Code, §§ 45, 237.

and there seems to be no reason to doubt that they have the power to provide that transfers, instead of being made by recorded deed, shall be made by the giving up of one certificate and the issue of another, defining at the time, and once for all, the new taker's estate. In exceptional cases there would be some difficulty in ascertaining what the parties wished to do. Such cases would be rare: a vast majority of transfers are plain deeds or mortgages, perplexing, not from their contents, but from the necessity of finding them and of going through the whole train of them from a remote period. Even in cases of difficulty, it would be better to settle the questions at the time. But however this may be, it is hard to see how there can be any constitutional difficulty.

A speculative objection has been raised with reference to the constitutional power of a State to recompense persons who, under a system of conclusive certificates, may lose title. To this there are two answers. 1. It would be an entire novelty in this country to compensate persons who, after judicial notice deemed in law sufficient, are cut off. When we conclude to provide such compensation under our existing title-clearing statutes, it will be time to provide it under extension of them. 2. Experience has shown that, in practice, injury is almost never done, and that by the setting apart of a trifling portion of the fee charged for registration, a fund can be created ample to satisfy all possible claims not disclosed by the records and not brought to light by the judicial notice. It is needless, therefore, to consider the power of a State to provide indemnity. Such a discussion would only embarrass the consideration of the practical question of registration of titles.

H. W. Chaplin.

BOSTON.

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THE members of the Selden Society and others will be glad to know that vol. 3, by Mr. Baildon, is nearly ready for delivery, and that vol. 4, by Professor Maitland, is already in the press. The former is a collection of *placita* in the King's Courts, the latter of *placita* in the Manor Courts. Each contains an invaluable Introduction; the proof-sheets of Professor Maitland's Introduction being already at hand.

THE recent decision in *Whitby v. Mitchell*,¹ on the much-disputed question as to the existence of a rule at common law forbidding the limitation of estates for life to successive generations, seems not to have been received in England with favor. The case in brief was this: by a marriage settlement lands were conveyed to the use of the husband and wife successively for life, with remainder to the use of any of their children or more remote issue (born before appointment made) as the husband and wife should by deed appoint. By a deed (which of course had to be read as a part of the marriage settlement) they appointed to the use of a married daughter for life, with remainder to the use of her children living at the date of the deed of appointment. This last clause brought the remainder within the period allowed by the rule against perpetuities, since it necessarily became vested within a life in being at the time of the settlement; but the Court of Appeal decided that there was, resting on an old common-law prohibition against a possibility upon a possibility, a rule still in existence that if an estate were given to an unborn person for life followed by a remainder to any child of such unborn person, the remainder was void.

It is to be noticed that the court did not decide that the rule against perpetuities did not apply to contingent remainders.² They affirmed the existence of this other rule as entirely independent of the rule against

¹ 42 Ch. D. 494, affirmed in Court of Appeal, 44 Ch. D. 85.

² For a full discussion of this disputed question, on which the existence of the rule laid down in *Whitby v. Mitchell* has an important bearing, see Gray, *Perp.*, §§ 284-298. Mr. Justice Kay has held, since his decision in *Whitby v. Mitchell*, that the rule against perpetuities does apply to contingent remainders. *In re Frost*, 43 Ch. D. 246.

perpetuities; and they based their decision principally upon the opinion of the late Mr. Joshua Williams. "The idea that there cannot be a possibility on a possibility seems to have been a conceit invented by Chief Justice Popham,"¹ and Mr. Williams himself admits that it is bad law, but nevertheless lays down absolutely the rule affirmed in *Whitby v. Mitchell*, saying that it is "apparently derived from the old doctrine which prohibited double possibilities."² That the rule in question was not derived from this exploded doctrine, but was, on the contrary, a mere corollary to the rule against perpetuities, seemed to have been abundantly proved by the careful examination of authorities made by Mr. Lewis³ and Mr. Gray⁴ in their books on perpetuities; and the decision of *Whitby v. Mitchell* has since been impugned by an able article by Mr. Vaizey in the October number of the "Law Quarterly Review"⁵ and also by the "Solicitors' Journal."⁶

In view of the exhaustive researches made by the writers above referred to, it would be useless for us to attempt any discussion of the subject; and we content ourselves with the expression of a humble opinion that the Court of Appeal has made an erroneous decision. From a practical point of view, the decision is at least unfortunate; for it puts a greater restriction upon future interests which happen to be in the form of contingent remainders than upon others, although on principle there seems to be no reason for making such a distinction. In regard to the question of remoteness, all future contingent interests are in reason upon the same plane, and it is to be regretted that a useless distinction should be made, based upon an evident misinterpretation of the old cases.

ONE of the most perplexing questions which has arisen in connection with the "original package" decisions is, what constitutes an original package? Whether, for example, where a box containing a dozen bottles of liquor is brought into a State, the box is the original package, or whether each bottle may be so treated. In the recent case of *Allen v. Black*,⁷ in the Circuit Court for the Southern District of Iowa, where a box containing bottles of whiskey was shipped from Illinois to Iowa, and sold by the bottle in Iowa, the court considered the question whether the bottle or the box was the original package as a doubtful one. In the Circuit Court in Mississippi, however, in the case of *In re Harmon*,⁸ it was flatly decided that the box, and not the bottle, constituted the original package within the meaning of the decisions of the Supreme Court.

The court says in this latter case: "These bottles were closely packed together in the boxes by the shipper, and in that form shipped to Sardis, and in that way they were kept by relator until sold and taken out, one bottle at a time. It was, in other words, a retail saloon. I am satisfied that the whiskey in the box, although in separate bottles for the convenience of the trade in this retail saloon, was but one package within the meaning of the interstate clause of the Constitution, as construed by the Supreme Court." Further on the judge continues: "In reaching the above conclusion, I do not decide

¹ Gray, Perp., § 125.

³ Lewis, Perp., c. 16 & Suppl. 97-153.

⁵ 24 L. Quar. Rev. 410.

⁷ 43 Fed. Rep. 228 (1890).

² Williams, Real Prop. (6th ed.) 245.

⁴ Gray, Perp., §§ 125-133, 191-199, 287-298.

⁶ 35 Sol. Jour. 83 (Dec. 6th, 1890).

⁸ 43 Fed. Rep. 372 (1890.)

that a single bottle of whiskey may not be shipped and sold by itself as a single and unbroken package, but it must be shipped alone and sold as shipped."

This would seem to be a pretty strong decision, especially as it appeared in the case that the boxes in which the bottles of whiskey were transported were uncovered and furnished by the express company, while each bottle was sealed up in a separate paper package. One may infer from the opinion of the judge that a single bottle, properly sealed, would be considered an original package; and on what principle he draws a distinction between one "single bottle" and half a dozen, which happen to be shipped at the same time and put for the sake of convenience into one box, and that an open, uncovered one, it is difficult to comprehend, and the opinion must be considered as greatly weakened in consequence. Logically, the learned judge would be obliged to hold that if a car-load of bottles of whiskey, each bottle separately packed in a wrapper and sealed, were sent from one State to another, the original package would be the freight-car, and the original package would be broken as soon as the first whiskey bottle was removed. It is difficult to see the force of such reasoning as this. Logically, each bottle would seem to be an original package, and if sold as shipped, it is difficult to discover on what principle the vendor could be indicted.

MAY A MEMBER OF CONGRESS CIRCULATE HIS SPEECHES GENERALLY,
IF DEFAMATORY?

IN his Commentaries on the Constitution of the United States, Mr. Justice Story says: "Although a speech delivered in the House of Commons is privileged, and the member cannot be questioned respecting it elsewhere, yet if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel. And the same principles seem applicable to the privilege of debate and speech in Congress." § 866.

To this the following note will appear in the 5th ed. of the same work (now in the press), by the editor, Mr. Bigelow:—

The first sentence quoted would now be too broad a statement. A member of Parliament may certainly circulate among his constituents a speech made by him in Parliament. *Wason v. Walter*, L. R. 4 Q. B. 73, 95; *Davison v. Duncan*, 7 El. & B. 223, 229. (For the law of England before legislation see *Stockdale v. Hansard*, 9 Ad. & E. 1; *Wason v. Walter*, *supra*.) And it may be doubted whether any such qualification of the privilege as that suggested (of constituency) can be worked in this country. Practically, the qualification is everywhere ignored, if it exists. Members of Congress, if not of the State Legislatures, act upon the supposition that the circulation, by themselves, of their speeches is (*prima facie*) privileged, and that the privilege is not limited in territory. And if such circulation is privileged, it cannot be limited in that way without absurd consequences. A member of the House of Representatives delivers a speech there, containing defamatory reflections upon some one; on the next day he is transferred to the Senate, and the same speech, with the same reflections, is delivered there; must the speaker be confined to the particular district which he represented in the House, in circulating the first speech, while he has the whole State for the

second? Again, the subject of the reflections themselves may concern the whole country, as in the case of an impeachment; in such a case shall one who represents a very poor and degenerate constituency, *e.g.* the lower part of the city of New York, have the right to circulate his speech there, where it will probably have no effect for any purpose, and be cut off from circulating it among more enlightened people? Again, if a "fair report" of the proceedings of the body may be published (without malice), by newspapers circulating generally, how can it be that a member of that body must not circulate his own speech,—assuming that it contains or is accompanied with a fair report of the proceedings,—beyond his constituency? Once more, a member's constituency is migratory part of the year, as from June till October; must the member withhold his speeches during that time for fear that, if he sends them for distribution, addressed generally to the postmaster of a common resort of his constituents, copies may be delivered to persons not of his district or State?

It is plain then that any concession that a member of the Legislature may send his speeches to his constituents is a yielding, in this country, of the whole argument (*see Story, ut supra*) against privilege in such cases. And, further, the existence of a privilege itself, for the circulation of a speech by the person who made it, is in ordinary cases warranted and required by the general rule already referred to, by which fair reports of the proceedings may be privileged. "In ordinary cases," we say, for generally the printed speech contains a sufficient report of the occasion. The real difficulty, so far as there is any difficulty, is with the circulation of speeches which would not be privileged on the footing of a publication, *e.g.*, in the newspapers, of a fair report of the proceedings. And in regard to that case, it is hard to see any reason which can justify circulation among a member's constituency without justifying circulation generally. It is hard to justify either. The true rule, it is apprehended, should be to put the circulation of speeches altogether upon the footing of fair reports, justifying the speaker only as he would be justified as the publisher of a newspaper reporting to the world the proceedings of the Legislature.

It is now too late, however it may have been sixty years ago (*Story wrote in 1832*), to question a privilege of fair reports; and as for the doctrine of privilege itself, that of course is fundamental. Society could not long exist if to do harm, whether in self-protection or in the discharge of duty, were not permitted. It is only necessary that the justification should be limited to the reasonable requirements of the particular case. I may do harm to my neighbor only in so far as may reasonably appear necessary in the discharge of duty or in protecting myself, my family, or my property.

The privilege in question is of course of the kind called *prima facie*; that is, it exists on the footing that the act of the sender was not malicious,—not done, *e.g.*, with an indirect motive of wrong. (As to malice in that sense see *Stevens v. Midland R'y Co.*, 10 Ex. 356; *Abrath v. Northeastern R'y Co.*, 11 Q. B. Div. 440, 450, Bowen, L. J.; s. c. 11 App. Cas. 247.) But the mere sending a speech beyond one's constituency, far from establishing, could not even, in reason, be evidence of malice.

Melville M. Bigelow.

THE newspapers seem to have fallen into error as to the ground of the decision of the United States Supreme Court in the Kemmler case, 136 U. S. 436. The court is criticised for holding that execution by electricity is not a cruel and unusual punishment, prohibited by the eighth amendment to the Constitution of the United States, — that cruel and unusual punishments shall not be inflicted. But the counsel made no claim upon this ground, and in fact no lawyer would assert that the eighth amendment gave the United States courts any right to interfere in this case. The court expressly said: "It is not contended, as it could not be, that the eighth amendment was intended to apply to the States." Chief Justice Marshall had decided, in *Barron v. Baltimore*, 7 Pet. 243, that this provision was a limitation solely upon the Federal government. The ground which Kemmler's counsel took was that the law under which the prisoner was sentenced violated the fourteenth amendment, — first, because it abridged the rights and immunities of a citizen of the United States; and, second, because it was not due process of law. The Slaughter-House cases, 16 Wall. 36, annihilated the first point, and the second was untenable. The court seemed to intimate, however, at the close of the opinion, that a punishment might be so cruel as not to be "due process of law." Even this is very doubtful. A State could probably revive burning at the stake, as far as United States authority is concerned. Although the court of New York held that execution by electricity was not repugnant to its own constitution, that opinion might well be changed in the light of subsequent experiment.

Apropos of this subject, the phrase "cruel and unusual punishment" probably refers to quality and not quantity, or, as the Supreme Court of Kansas said, to "kind and not duration."¹ The facts of that case bring out the distinction in a forcible and interesting manner. By an act of the Legislature in 1887 the age of consent was raised to eighteen, and unlawful intercourse with any female under that age was made punishable by not less than five nor more than twenty-one years. In such a case, therefore, five years is the least possible punishment for fornication. Such a severe punishment, it was argued, was cruel and unusual; but the case was decided contrary on the distinction between amount and kind. The court remarked that the punishment was "a severer one than had ever before been provided for in any other State or country for such an offence."

IN view of the conflict of authorities in the United States as to whether a common carrier shall be allowed to limit his liability for the loss of goods, even where the loss occurs through his own negligence, it is interesting to note a recent decision in the Supreme Court of Pennsylvania, in the case of *Pennsylvania R.R. Co. v. Weiller*.² The court distinctly lays down the rule that although there is an agreed valuation of the goods between the shipper and the carrier, and although it is expressly stipulated that the carrier shall not be liable beyond such valuation for loss occurring *from any cause whatever*, and in consideration of such agreement a lower rate of freight is charged, yet the carrier is not thereby relieved from liability for the actual value of the goods lost.

¹ *State v. White*, 25 Pac. Rep. 33.
² 29 Am. Law Reg. 766 (1890).

It is pretty firmly established that a common carrier cannot, by a simple stipulation in the bill of lading, contract away his common-law liability for loss arising from his own negligence, in the absence of an express valuation agreed upon between the shipper and the carrier. But the question on which the courts of this country are at variance is whether the presence of an agreed valuation will relieve the carrier from responsibility.

The doctrine of *Pennsylvania Co. v. Weiller* obtains in twelve States and the District of Columbia; the contrary doctrine, in the Supreme Court of the United States, and in nineteen of the States. So that though the larger number of jurisdictions are in favor of allowing the carrier to contract away his liability for negligence, yet the law cannot by any means be regarded as settled.

The leading case in opposition to the Pennsylvania doctrine is *Hart v. Pennsylvania R.R. Co.*,¹ in the Supreme Court of the United States. The court agreed that a common carrier could not stipulate for exemption from liability for his own negligence, but laid it down that where the shipper has agreed upon a certain valuation of his goods, and has also agreed that the carrier shall not be liable beyond this sum, it was "just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier."² The grounds of the decision are that to disregard the agreement after loss "is to expose the carrier to a greater risk than it was intended he should assume. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater." The theory that the shipper is estopped to deny that the actual value of the goods is the value he himself has put upon them, is perhaps the prevailing basis of decisions in jurisdictions where the case of *Hart v. Pennsylvania R.R. Co.* has been followed.

The grounds for the opposite conclusion are that such a stipulation is contrary to public policy, and that the old common-law rule of absolute liability, except for loss occurring through the act of God or the public enemies, had been sufficiently broken in upon by allowing the carrier to exempt himself from liability by special contract for loss not occurring through his own negligence. And that even though the shipper does consent to a certain valuation, he cannot thereby relieve the carrier from liability for negligence, because in so doing he is trying to regulate not his own but a public right. The public welfare demands that the common carrier shall be responsible for his own negligence and that of his servants, and consequently any agreement which attempts to interfere with this public right must be void, as contrary to public policy.

A similar decision to that reached in *Pennsylvania Co. v. Weiller* has been handed down very recently in the analogous case of a telegraph company, the *W. U. Tel. Co. v. Short*,³ in the Supreme Court of Arkansas. It was held that an agreement entered into between the sender of a telegram and the telegraph company, exempting the company from liability beyond the price of the message for mistakes or delays in the transmission or delivery, unless the message is repeated, whether happening through the negligence of the company or otherwise,

¹ 112 U. S. 331 (1884).

² Per Blatchford, J.

³ 14 S. W. Rep. 649 (1890).

was void as against public policy. The court says: "It is true that many authorities have held that such an agreement is binding upon all who assent to it," because of the "risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays;" but this is "not a sufficient reason why such stipulations should be sustained. The telegraph company is only bound to use ordinary care and diligence in transmitting messages, and is not responsible for any errors or failures which such care and diligence are insufficient to guard against or avoid."

THE Bishop of Lincoln's case, which has attracted so much attention in England on account of its importance in regard to the rites of the church, presents also several matters of interest from a legal point of view. The jurisdiction of the Archbishop of Canterbury's court (a question to which attention was called in 3 Harv. Law Rev. 42) was affirmed by the judgment delivered in May, 1889, but it was not until Nov. 21, 1890, that the archbishop delivered judgment upon the merits. The judgment, which is exceedingly long, shows great learning and very careful research in regard to the ecclesiastical questions at issue. The point which chiefly concerns us, however, is the fact that, although the archbishop's court is admitted to be one of first instance from which an appeal lies to the Privy Council, the archbishop disregards three decisions of the Privy Council and reaches exactly opposite conclusions.¹ His justification lies in the fact that his historical investigations, which appear to have been most thorough, have thrown new light upon the questions in dispute; and it must be conceded that upon such subjects his opinion, based upon the profound learning of himself and the five bishops sitting with him, is of much greater weight than that of the judicial committee of the Privy Council.

To a lawyer, the spectacle of a court of first instance undertaking to review the decisions of the court of last resort is indeed somewhat startling. Yet from a layman's point of view (at any rate on this side of the water) it cannot be denied that the result reached seems eminently satisfactory. For what more fitting than that a purely ecclesiastical question should be decided by the highest ecclesiastic in the land, unfettered by the opinions of common-law judges.

From a practical standpoint, moreover, there is an obvious difference between this case and that of an inferior common-law court. For while it would be sheer waste of time, if nothing worse, for the latter to disregard a decision of the House of Lords (especially in the light of the English doctrine that the House of Lords is absolutely bound by its own decisions), it seems to be generally supposed that in the case before us the defeated party will be satisfied to abide by the archbishop's judgment.

¹ *Martin v. Mackenochie*, 2 P. C. 365 (1868); *Hebbert v. Purchas*, 3 P. C. 605 (1871); *Ridsdale v. Clifton*, 2 P. D. 276 (1877).

THE LAW SCHOOL.

LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

SURETYSHIP.—STATUTE OF FRAUDS.—PROMISES MADE ON A NEW CONSIDERATION.—*From Professor Langdell's Lectures.*—The class of cases like *Williams v. Leper*, 3 Burr. 1886, in which A, a creditor of B, gives up a lien or other security in exchange for C's promise to pay the debt of B, have brought much confusion into the subject of suretyship. For example, when the consideration thus given by A inures to C's benefit, the rule has sometimes been laid down (as in New York, in *Leonard v. Vredenburgh*, 8 Johns. 29) that C's promise is taken out of the Statute of Frauds, section 4, as a matter of law; and even when the consideration inures to B's benefit the view has been put forward (see the dissenting opinion in *Mallory v. Gillett*, 21 N. Y. 412) that the mere fact of the plaintiff's giving up a security takes the case out of the statute. The principles, however, which govern the case are in reality simple. It was perfectly possible for C to make a promise of suretyship, i.e., to incur an obligation collateral to B's; the sole question is whether he intended to do so. He may have meant to make a collateral promise, or he may have meant to assume B's debt and to become himself the principal debtor, in which latter case his promise, not being one of suretyship, would not properly be within the Statute of Frauds. (It is true that it is not legally possible, in spite of the *dictum* of Buller, J., in *Tatlock v. Harris*, 3 T. R. p. 180, for C to step into B's shoes and assume his debt; but such may none the less be his intention.) This question of intention is one of fact, belonging to the jury, and not, as Lord Eldon seems to have thought in *Houlditch v. Mitne*, 3 Esp. 86, to the court. It is in this aspect only, as bearing on C's intention, that the inquiry to whose benefit the consideration inured becomes material. When a promise is made to pay the debt of another and to pay it as his debt, the intention to make a collateral promise may naturally be inferred unless there is evidence to the contrary. Such evidence may be found in the fact that the consideration inures to the promisor's benefit; but it is by no means conclusive, and must be considered in connection with all the other circumstances of the case. That it is not conclusive is shown by the promise of a guaranty company, which, though made upon a new consideration inuring to the benefit of the company, is manifestly a promise of suretyship.

Where the consideration inures to B's benefit it is not clear why the mere fact that a security is given up should tend to show that C's promise is not one of suretyship. Some right must be relinquished by A in order to constitute a consideration for the promise; and there seems to be no special significance in the fact that the right is a lien or other security. If the security, e.g., goods distrained by A as landlord, should be given by A to C as his bailiff to sell and to pay the plaintiff's claim out of the proceeds, the Statute of Frauds would obviously not apply; but such a transaction is very different from an

absolute promise by C to pay B's debt, which was the case in *Williams v. Lepre*.

One reason why the courts have shown a disposition to take out of the Statute of Frauds promises made upon a new consideration inuring to the promisor's benefit is probably that where there is a new transaction, a bargain made and consideration given, there is less danger of the frauds which the statute was designed to prevent. But when the promise is one of suretyship, it is so plainly within the words of the statute that it cannot be taken out merely because it is not within the spirit.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — CONTRIBUTORY NEGLIGENCE — DIVISION OF DAMAGES. — A longshoreman while loading a vessel was injured, partly through his own negligence, partly through the negligence of the vessel. *Held*, in spite of his contributory negligence, he can recover for part of the damage. Courts of admiralty act upon "enlarged principles of justice, and are not bound by the positive boundaries of mere municipal law."

This case is the first in which this exact point had been presented to the Supreme Court, but the doctrine of divided damages had already been extended by that court to claims other than those for damages to the vessels which were in fault in a collision. *The Max Morris v. Curry*, 11 Sup. Ct. Rep. 29.

BILLS AND NOTES — ANOMALOUS INDORSER. — An inland bill of exchange was indorsed by a third person before its delivery to give the bank the security of an additional name. The indorser intended to assume the liabilities of an indorser only, while the bank intended to hold him as a surety; but there was no agreement on the point. *Held*, that in the absence of agreement he was liable as an indorser only and must have notice, and what the bank intended was immaterial. *De Pauw v. Bank of Salem*, 25 N. E. Rep. 705 (Ind.).

BILLS AND NOTES — DOMICILE NOTE. — If a depositor makes a note payable at his bank and the bank pays it, the bank is entitled to set off the note in an action brought by the depositor for the balance due him; but *semble* the bank is not liable to the depositor for a failure to pay such a note. *Bedford Bank v. Acoam*, 25 N. E. Rep. 713 (Ind.).

CONFLICT OF LAWS — POWER OF ATTORNEY. — Where an authority is given in a foreign country to an agent to transact business for his principal in other countries, it must be construed, in the absence of evidence of a contrary intention, according to the law of the place where the business is to be transacted. *In re Brazilian Telegraph Co.*, 39 W. R. 65 (Eng.).

CONSTITUTIONAL LAW — THE GRAND JURY. — The term "grand jury" had a well-understood meaning when the declaration of rights in the Constitution of North Carolina was adopted, and one of its most essential features was that the concurrence of at least twelve of its members was necessary to the finding of an indictment. Therefore where the Constitution provides that a "criminal indictment must be found by a grand jury," an act of the Legislature making the concurrence of nine members sufficient is unconstitutional. *State v. Barker*, 12 S. E. Rep. 115 (N. C.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SPECIAL APPEARANCE. — Texas statutes provide that a special appearance by a non-resident defendant for the purpose of pleading to the jurisdiction is a voluntary appearance which brings defendant into court for all purposes. *Held*, the statutes are valid. They do not deprive a person of life, liberty, or property without due process of law.

The fourteenth amendment of the Constitution of the United States does not give the defendant an inviolable right to have the question of the sufficiency of the service decided by the court in the first instance and alone. *York v. State of Texas*, 11 Sup. Ct. Rep. 9.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — DELEGATION OF POWER TO REGULATE. — The act of Congress, 1890, known as the "Wilson Bill," does not delegate to the States the power to regulate interstate commerce. Congress, in the exercise of the constitutional power to regulate foreign and interstate commerce, has declared the time when such imported property (intoxicating liquors) shall become subject to State laws. At some time imported property must lose the character of an article of interstate commerce, and become subject to State laws; and it is for Congress, which possesses the power to regulate commerce, to define the time or event which shall have the effect of subjecting importations to State control, and this is what is done by the "Wilson Bill" in regard to intoxicating liquors. *In re Spicker*, 43 Fed. Rep. 653, 657.

CONSTITUTIONAL LAW — SUIT TO QUESTION VALIDITY OF ELECTION. — A tax-payer may contest by equitable proceedings the validity of an election by which his interests are affected. The Statute of Limitations does not run against this right, but the action must be brought within a reasonable time after the election, and before the rights of innocent third persons have accrued under the action of the authorities in pursuance of the result of the election. *Jones v. Commissioners*, 12 S. E. Rep. 69 (N. C.).

CONTRACTS — ILLEGAL CONSIDERATION — AGREEMENT TO STIFLE PROSECUTION. — The plaintiffs, a local board, brought an indictment against the defendants for obstructing a public road, but later agreed to consent to a verdict of "not guilty" if defendants would restore the road. The defendants did not restore the road. *Held* (following *Keir v. Leemen*, 9 Q. B. 371), that the contract was void. An agreement to stifle a prosecution for a public injury is none the less void because the consideration is a public benefit and the accomplishment of the object of the prosecution, since nevertheless the administration of justice is taken from the judiciary. *Windhill Local Board v. Vint*, 45 Ch. Div. 351 (Eng.).

CRIMINAL LAW — ATTEMPT TO COMMIT LARCENY. — A person who puts his hand into the pocket of another to steal whatever may be in it is guilty of an attempt to commit larceny, though the commission of the crime was impossible because the pocket was empty. *People v. Moran*, 25 N. E. Rep. 412 (N. Y.). This point can now be considered finally settled in this country. The opinion of the General Term of the Supreme Court, which this case overrules, said all that could be said for the contrary doctrine. It is doubtful whether that doctrine would prevail even in England now; see *Reg. v. Brown*, 38 W. R. 95.

CRIMINAL LAW — FORMER CONVICTION. — *Held*, a conviction for simple larceny in a recorder's court is a bar to a subsequent prosecution in the city court for the taking of the same property, on the same occasion, from a dwelling-house, though the recorder's court did not have jurisdiction in a case of larceny from a dwelling-house. *Powell v. State*, 8 So. Rep. 108 (Ala.).

EQUITY JURISDICTION — REFORMATION OF DEEDS — VOLUNTARY TRUST. — The possession of certain land was given to a trustee for the benefit of the grantor's imbecile daughter. A deed was also executed and delivered, but through an error in description it did not cover the property of the grantor. *Held*, nevertheless, that equity could reform the deed although the conveyance was voluntary, for it constituted an executed trust. *Lynn v. Lynn*, 25 N. E. Rep. 635 (Ill.).

EVIDENCE — RELEVANCY. — Testimony that the plaintiff's attorney has taken the case on a contingent fee is not admissible. *Stearns v. Reidy*, 25 N. E. Rep. 762 (Ill.).

INSURANCE — CONDITIONS. — A provision in a fire-insurance policy that the company shall not be liable "for loss in case of fire happening by any insurrection . . . nor explosions of any kind whatever within the premises, nor by concussions merely," does not exempt the company from liability for loss caused by the explosion of a lamp. *Heffron v. Kittanning Ins. Co.*, 20 Atl. Rep. 608 (Pa.).

INSURANCE — DEATH BY DISEASE. — Death resulting from a malignant pustule

caused by the infliction upon the body of putrid animal matter containing poisonous "bacillus anthrax" is death from disease, and not from accident, within the terms of an accident policy. *Ruger, C. J., and O'Brien, J., dissenting. Bacon v. Mutual Accident Association*, 25 N. E. Rep. 399 (N. Y.).

INSURANCE — LACHES OF ASSIGNEE. — A life-insurance policy was assigned to W., who later reassigned a part of it to the insured. Both assignments were so attached that they could be easily removed. The insured detached the assignments and surrendered the old policy to the company, procuring instead a paid-up policy, which he assigned to a purchaser for value, without notice of the previous assignments. *Held*, that W. was guilty of such laches that he could not take advantage of the priority of his assignment. *Bridge v. Wheeler*, 25 N. E. Rep. 612 (Mass.).

JUDGMENT — SATISFACTION. — Property is levied on and sold by direction of the execution creditor who purchases it for the amount of his judgment with notice that it does not belong to the execution debtor. *Held*, that such purchase is a satisfaction of the judgment though the debtor had no title or interest whatever in the property, and the purchaser (the execution creditor) refuses to accept it. The doctrine of *caveat emptor* is strictly applied, and the purchaser operates as an irrevocable satisfaction of the judgment. *Thomas v. Glazener*, 8 So. Rep. 153 (Ala.).

LIBEL — CORPORATIONS — CHARGE OF CORRUPTION. — A corporation cannot maintain an action for libel in respect of an imputation of corruption, for it cannot be guilty of corruption, although the individuals composing it may. *Mayor, etc., of Manchester v. Williams*, 4 Jurist, 191 (Eng.).

MUNICIPAL CORPORATIONS — DELEGATION OF POWER. — The power to make certain regulations in regard to contagious diseases was delegated to an executive committee, who appointed local sub-committees. In the absence of any regulations by these sub-committees in relation to dogs, and without revoking the power granted them in this respect, the committee itself made certain regulations in regard to dogs. *Held*, that these regulations were valid. The delegation did not deprive the executive committee of the right to exercise the powers delegated. *Huth v. Clarke*, 63 L. T. Rep. N. S. 348 (Eng.).

REAL PROPERTY — ACTION AGAINST A RAILROAD FOR DAMAGES — RES ADJUDICATA. — A railroad having been constructed along a street on which plaintiff owned two lots, a few hundred feet apart, he brought action against the railroad company for damages to one of these lots by reason of the construction and operation of the railroad, and recovered a judgment. He subsequently brought another action for damages to the other lot, arising from the same cause. *Held*, that the judgment in the former suit was a bar to the action for damages to the other lot accruing prior to the former suit from the same cause, the matter being *res adjudicata*; that the cause of action was the construction and operation of the railroad; and that this was but one cause of action, irrespective of the number of pieces of property damaged. *Beronis v. Southern Pac. R. R. Co.*, 24 Pac. Rep. 1093 (Cal.).

REAL PROPERTY — EASEMENTS — ANCIENT LIGHTS — FUTURE DAMAGE. — Action to restrain the obstruction of ancient lights. The court granted an injunction on the following ground: That although the injury to the premises in their present use may not be so considerable as to justify the granting of an injunction, yet the probable injury in the future use to which, from the circumstances, the premises may reasonably be expected to be put, would be considerable, and so the plaintiff entitled to an injunction. *Dicker v. Popham et al.*, 63 L. T. Rep. N. S. 379 (Eng.).

The court follows the rule laid down in *Aynsley v. Glover*, 18 Eq. 551, that equity will not interfere unless the injury is such that the plaintiff would get considerable damages at law. In finding considerable damages the court follows *Moore v. Hall*, 3 Q. B. Div. 178, which departed from former decisions, and in assessing damages considered the probable injury to the possible future use of the premises. In this case, for the first time, as said by the court, the right of the plaintiff to relief rests mainly in damages likely to accrue in the future.

REAL PROPERTY — EMBLEMENTS — LAND SET OFF AS ALIMONY. — A growing crop of wheat sown by a husband on his land pending a suit for divorce and

alimony passes by a decree which gives the land to the wife as alimony, although the crop is not referred to in the decree. *Herron v. Herron*, 25 N. E. Rep. 420 (Ohio).

REAL PROPERTY — EQUITABLE EASEMENTS — PARAMOUNT CHARGE. — The defendant D. was owner in fee of a triangular piece of land subject to a restrictive covenant in favor of the defendant S. and others that it should never be built upon, which made the land almost valueless. The street in front of the land was improved under a statute that made the betterments "a charge on the premises in respect of which" the expenses for such improvements "were incurred." Held, that this was a charge, not upon any particular interest in the land, but upon the whole proprietorship in it; so that the land may be sold free from the restrictive covenant. *Guardians of Tendring Union v. Dowton*, 45 Ch. D. 583 (Eng.).

REAL PROPERTY — LEASE — CONDITION AGAINST SUBLEASE. — A lease provided that the premises "should be occupied for the sale of teas, coffees, spices, and similar goods," and that the lessee "should not sublet or permit the occupancy by any other party without the written consent of the lessors." By an oral license the lessors permitted the lessees to sublet to a person for a music store. Held, that this was not such a waiver of the conditions as would give the right to sublet to any one else or for any other business. *Wertheimer v. Hosmer*, 47 N. W. Rep. 47 (Mich.).

REAL PROPERTY — TAX SALE — NOTICE TO PERSON IN POSSESSION — REDEMPTION. — One who, without any claim of ownership or the right of possession, herds his cattle on a range of open and uncultivated land is not in possession of a quarter-section forming part of the range within the meaning of Code Iowa, § 894, requiring notice of the expiration of the time of redemption from a tax sale to be served on the person in possession of the land. *Brown v. Pool*, 46 N. W. Rep. 1069 (Iowa).

SALES. — Where a purchaser of personalty, under a contract by which the title is to remain in the seller until payment of the entire price, has unconditionally promised to pay the price therefor, and has taken possession of the property and used it as his own, and it is burned while, in his possession before payment of the purchase-money becomes due, without any negligence on his part, he is liable for the price contracted to be paid. *Tufts v. Griffin*, 12 S. E. Rep. 68 (N. C.). See *Swallow v. Emery*, 111 Mass. 356, *contra*.

SALES — DEPOSITS OF WHEAT WITH MILLER. — The plaintiffs delivered wheat to the defendants, who were dealers in grain and conducted a warehouse and flouring-mill, and the defendants agreed to deliver to the plaintiffs on request a certain quantity of bran and flour for each bushel of wheat. Before the delivery of all the flour and bran, the warehouse of the defendants was burned without fault on their part and the flour and bran destroyed. Held, the transaction was a sale and not a bailment, as there was no undertaking to restore the same wheat either in its original or in an altered form, and so the defendant must pay for the wheat. *Woodward v. Semans*, 25 N. E. Rep. 444 (Ind.).

TRESPASS — ACCIDENTAL INJURY — NEGLIGENCE. — In the absence of negligence a man who accidentally shoots another is not liable in an action of trespass. *Stanley v. Powell*, 39 W. R. 76 (Eng.).

An effort is made to distinguish all the old cases which appear to lay down a contrary doctrine. The American law has long been in accord with this case, and there has been little doubt that the English law would be declared the same at the first opportunity.

TRUSTS — CONFLICTING EQUITIES — PRIORITY OF NOTICE. — A solicitor received a sum of money and represented that he had invested it in a specified mortgage, whereas it was standing in his own name. Later, the solicitor deposited the mortgage deed with his banker as security for an overdrawn account. The bank, without any notice of the client's claim and before any notification by the client, notified the mortgagor. Held, that the solicitor was trustee of the mortgage for his client; but that the bank should not gain by preference, as the principle of *Dearle v. Hall*, 3 Russ. 1, did not apply to a mortgage of realty. *In re Richards*, 45 Ch. D. 589 (Eng.).

TRUSTS — ORAL TRUST IN LAND. — At common law, while a trust in land may be created by parol, there must be a valuable consideration to support the

oral trust where there is no transfer of the legal title. *Pitman v. Pitman*, 12 S. E. Rep. 61 (N. C.).

This case follows the rule laid down by Lord Chief Baron Gilbert, Gilbert on *Uses*, 270, and is a qualification of the broad statement that, in the absence of the Statute of Frauds, trusts in land may be created by parol. See *Dean v. Dean*, 6 Conn. 287, *contra*.

USURY — COMPOUND INTEREST. — An agreement to make interest as it matures become principal so as to bear interest, where the rate of interest charged is the highest legal rate, is usury. It amounts to compound interest. This rule does not forbid interest-bearing coupons. *Drury v. Wolfe*, 25 N. E. Rep. 626 (Ill.).

WRITS — FAILURE TO ATTACH A SEAL TO AN EXECUTION. — The failure to attach the seal of the court to an execution does not render it void, but voidable merely. *Warmoth v. Dryden*, 25 N. E. Rep. 433 (Ind.).

REVIEWS.

THE DOCTRINE OF EQUITY. A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY. By John Adams. Eighth edition, by Robert Ralston, of the Philadelphia Bar. Philadelphia, T. & J. W. Johnson & Co., 1890. 8vo. Pages 839.

We are glad to see that this valuable work is not to be allowed to become out of date. It has been so long and so well known by lawyers as one of the very best works on the subject of equity that any extended criticism is unnecessary. The fact that it has passed through so many editions is sufficient to show the estimation in which it is held, and its popularity deserves to be long continued. The present edition is by Robert Ralston, of the Philadelphia Bar. The body of the work is unaltered, but the foot-notes have been carefully revised and re-arranged. They are very full, and contain the very latest authorities. Some idea of the number of the citations may be obtained from the fact that the table of cases occupies nearly one hundred pages. The work of the publishers has been done in their usual thorough manner, and leaves nothing to be desired.

G. C.

THE LAW OF COLLATERAL INHERITANCE, LEGACY, AND SUCCESSION TAXES. By Benj. F. Dos Passos, Assistant District Attorney, New York County. L. K. Strouse & Co., New York, 1890. 8vo. Pages xxii and 328.

The method of taxation known as the "collateral inheritance tax" is not general in this country, having been adopted as yet by but nine States, and in five of these only since 1864. The tendency of legislation, however, seems to be distinctly in favor of this means of raising money, and we may expect to see it adopted in additional jurisdictions in the near future. Wherever it now exists it is a large and increasing source of revenue, and by a natural consequence the cause of much litigation.

Mr. Dos Passos' book, which is the first on this subject, is therefore timely, both because of the probability that statutes similar to those of which it treats will soon be common in the different States, and because the meaning and effect of the existing statutes is already a matter of considerable importance. It is for this latter reason that the book is

written. It is a clear, concise, and thorough statement of the law peculiar to this subject, and, as the various statutes have so much in common, it cannot fail to be valuable to the practising lawyer in the jurisdictions where a collateral inheritance tax is imposed. There is a copious citation of authorities throughout the book, and the Appendix contains the collateral inheritance tax statutes now in force in Connecticut, Maryland, New York, and Pennsylvania, a number of practice forms for use under the New York act, and an Index. The arrangement and printing are excellent.

A. C. T.

THE AMERICAN DIGEST: ANNUAL, 1890: ALSO THE COMPLETE DIGEST FOR 1890. Prepared and edited by the editorial staff of the National Reporter System. St. Paul, Minn.: West Publishing Co. New York: Digest Publishing Co. 1890. Pages 2169.

This volume covers only eight months of the year 1890, from January first to August thirty-first, as the publishers have decided to make their annual cover the court, instead of the calender, year. Nevertheless, it is nearly as large as the annual for 1889, as it contains certain additional matter. This consists largely of the remaining cases necessary to close without omission the gap between Vol. 18 of the "United States Digest" and the "American Digest." The scope of the "American Digest" has been extended so as to include the reported decisions of the county courts of Pennsylvania, the Circuit Courts of Ohio, and selected current decisions of the English courts, and also notes of current legislative enactments, and references to annotations in leading periodicals. These features are added in consequence of the consolidation of the "American Digest" with the "Complete Digest." The arrangement and typography are as usual.

G. C.

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THE DOCTRINE OF PRICE *v.* NEAL.

THE plaintiff in this prominent case¹ was the drawee of a bill of exchange; the defendant was an indorsee for value in due course. The bill was paid on presentment, the drawee and holder being alike ignorant that the signature of the ostensible drawer was forged. Upon discovery of the forgery the plaintiff sought to recover the money on the ground that it had been paid under a mistake. But the Court of King's Bench gave judgment for the defendant, Lord Mansfield delivering the opinion.

The rule established by *Price v. Neal*, that a drawee pays (or accepts) at his peril a bill, on which the drawer's signature is forged, has been repeatedly recognized both in England and the United States.² The same rule prevails in Scotland³ and on the continent

¹ 3 Burr. 1354; 1 W. Bl. 390, s. c. This case, as well as most of those discussed in this paper, will be found in Professor Keener's valuable collection of Cases on Quasi-Contracts.

² Smith *v.* Mercer, 6 Taunt. 76; Cocks *v.* Masterman, 9 B. & C. 902; Hoffman *v.* Milwaukee Bank, 12 Wall. 181; Young *v.* Lehman, 63 Ala. 519, 523; First Bank *v.* Ricker, 71 Ill. 439, 441; Nat. Bank *v.* Tappan, 6 Kas. 456; Comm. Bank *v.* First Bank, 30 Md. 11; Hardy *v.* Chesapeake Bank, 51 Md. 562, 585; Nat. Bank *v.* Bangs, 106 Mass. 441, 444; Danvers Bank *v.* Salem Bank, 151 Mass. 280, 282; Bernheimer *v.* Marshall, 2 Minn. 78; Stout *v.* Benoit, 39 Mo. 277, 299; Ins. Co. *v.* Bank, 60 N. H. 442, 446; Weisser *v.* Dennison, 10 N. Y. 68, 75; Park Bank *v.* Ninth Bank, 46 N. Y. 77; Salt Bank *v.* Syracuse Inst., 62 Barb. 101; Hagen *v.* Bowery Bank, 64 Barb. 197; Nat. Bank *v.* Grocers' Bank, 2 Daly, 289; Ellis *v.* Ohio Co., 4 Oh. St. 628, 652; Levy *v.* U. S. Bank, 1 Binn. 36; People's Bank *v.* Franklin Bank, 88 Tenn. 299; City Bank *v.* Nat. Bank, 45 Tex. 203, 218; Rouvant *v.* San Antonio Bank, 63 Tex. 610; Bank of St. Albans *v.* Farmers' Bank, 10 Vt. 141; Johnson *v.* Bank, 27 W. Va. 343, 348, 359; Ryan *v.* Bank, 12 Ont. R. 39.

The ill-considered case, *McKleroy v. Southern Bank*, 14 La. An. 458, is a solitary

³ Clydesdale Bank *v.* Royal Bank (Court of Sess., March 11, 1876).

of Europe.¹ Unfortunately, there is not a similar unanimity as to the reason of the rule. The drawee's inability to recover the money paid is often referred to his supposed negligence. He ought, it is said, to know the signature of the drawer. Against this view two sufficient objections may be urged. In the first place, negligence on the part of the payor is not, in general, a bar to the recovery of money paid under a mistake.² If, for instance, a creditor receives payment of a debt, which has already been paid, although he may have received the money in good faith, and the debtor may have paid in careless forgetfulness of the prior payment, it is obviously unjust for the creditor to retain the second payment, and thereby enrich himself at the expense of the debtor. Secondly, if the drawee's negligence were the test, he ought to be allowed to show, in a given case, that he was not negligent; for example, that the forgery was so skilfully executed as naturally to deceive him. But such evidence would not be received. "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free from blame and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril."³

Another so-called explanation of the rule, that the drawee pays a forged bill at his peril, has obtained great currency; namely, that the drawee is "conclusively presumed to know," or is "estopped to deny," the signature of the drawer. These expressions are repeated by text-writer and judge, apparently without a suspicion of their worthlessness as an explanation of the rule in question. Yet to one asking why the drawee pays at his peril, it is no sufficient answer to say, that the drawee is conclusively presumed to

decision to the contrary effect. But this case, though not cited, is virtually overruled by *Howard v. Mississippi Bank*, 28 La. An. 727. By statute, in Pennsylvania, the holder must refund to the drawee in cases like *Price v. Neal*. *Corn Bank v. Bank of Republic*, 78 Pa. 233. In *Goddard v. Merchants' Bank*, 4 N. Y. 147, a payor for honor was allowed to recover the money paid to the holder, on the ground that he paid without first inspecting the bill. Two judges dissented, and their views were followed in *Bernheimer v. Marshall*, 2 Minn. 78; *Johnston v. Bank*, 27 W. Va. 343 (see also *Leather v. Simpson*, 11 Eq. 398, 403). In *Wilkinson v. Johnston*, 3 B. & C. 428, a payor for honor was allowed to recover, his position being thought distinguishable from that of a drawee. Such a distinction seems ill-founded in reason, is opposed to the continental law, and was disclaimed in *Goddard v. Merchants' Bank*, *supra*. The case is, at least, of doubtful authority. Chalmers, *Bills of Exch.* (3 ed.) 196.

¹ *s* Pardessus, *Cours de Droit Commercial* (3 ed.), § 501; Wächter, *Wechselrecht*, 482.

² *Kelly v. Solari*, 9 M. & W. 54; *Appleton Bank v. McGilvray*, 4 Gray, 518.

³ *Per Alvey, J.*, in *Hardy v. Chesapeake Bank*, 51 Md. 562, 585.

know the drawer's signature. A conclusive presumption of the drawee's knowledge means simply that his ignorance, whether culpable or excusable, is an irrelevant fact. The question, therefore, immediately recurs: Why is the drawee's excusable ignorance an irrelevant fact?¹

The holder's right to retain the money paid him by the drawee has sometimes been placed upon the ground, that, in consequence of the payment, he has lost the right of recourse against prior indorsers, which he would have had, in case the bill had been dishonored. There seems to be great force in this argument. But, if the holder's right of retention were founded solely upon this argument, it would follow that in cases where there were no prior indorsers, he would have to refund the money to the drawee. But the decisions show that the drawee pays at his peril in these cases also.² The holder's right to retain the money must depend, therefore, upon a more comprehensive principle than that of the loss of rights against prior indorsers.

The true principle, it is submitted, upon which cases like Price *v.* Neal are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity (and the action of assumpsit for money had and received is, in substance, a bill in equity) cannot properly interfere to compel the holder to surrender his legal advantage. The same reasoning applies if the drawee has merely accepted the bill. The legal title to the acceptance is in the holder. A court of equity ought not to restrain the holder by injunction from enforcing his legal right, nor should a court of law permit the acceptor to defeat his acceptance by an equitable defence.

Lord Mansfield, in Price *v.* Neal, considered, it is true, the ques-

¹ If there were in truth any such conclusive presumption of the drawee's knowledge, a drawee who *purchased* instead of paying a forged bill ought not to recover his purchase-money; but a recovery is allowed. *Fuller v. Smith*, 1 C. & P. 197; *Ry. & M.* 49, s. c.

² *Howard v. Mississippi Bank*, 28 La. An. 727; *Commercial Bank v. First Bank*, 30 Md. 11; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *Levy v. U. S. Bank*, 1 Binn. 27; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141; *Johnston v. Bank*, 27 W. Va. 343.

tion of the drawee's negligence, but it is evident, from the following extracts, that he based his opinion chiefly upon the principle just stated:—

It is an action upon the case for money had and received to the plaintiff's use; in which action the plaintiff cannot recover the money unless it be *against conscience* in the defendant to retain it. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange, indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery. . . . If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man.¹

If, indeed, the equities are not equal,—if, for instance, the holder acquired the bill, not in the course of business, but as a gift,—he ought not to be permitted to retain the money paid him by the drawee. This is not a case where one of two innocent persons must suffer a loss in any event. If the money is repaid, neither will suffer a loss. For the holder, although he refund, is not really out of pocket. By refusing to repay, he would be striving unconsciously to enrich himself by a positive increase of his property at the expense of the drawee.

Again, the equities might be unequal because of the holder's misconduct. He might have purchased the bill from a stranger, making no inquiries as to his identity or character. Inasmuch as such inquiries would ordinarily disclose the fraud, if any, and prevent its success, the holder, who thus carelessly fails to satisfy himself as to the identity and honesty of his transerrer, may fairly be held responsible for the consequent loss, which must fall either on the drawee or himself. The general principle and this limitation are forcibly stated by Ranney, J.:—

We have nowhere doubted the wisdom or policy of the rule, which allows an innocent holder to require the drawee to pass upon the signature of the drawer, and makes him responsible for the decision he makes; nor the justice of permitting the former to retain the money received upon a forgery when some one must suffer by the mistake. But we must be better informed than at present, before we shall be able to perceive the justice or propriety of permitting a holder to profit by a mistake which his

¹ The same principle is stated in *Commercial Bank v. First Bank*, 30 Md. 11, 22; *Gloucester Bank v. Salem Bank*, 17 Mass. 42; *Bernheimer v. Marshall*, 2 Minn. 78, 83.

own negligent disregard of duty has contributed to induce the drawee to commit.¹

So, also, a holder who acquired the bill in good faith and with due care, but afterwards discovered or suspected the forgery, could not honestly collect the bill, and if he should collect it, would be bound to refund the money.²

The generally received rule, that the drawee pays or accepts a forged bill at his peril, has nevertheless been assailed by the distinguished author of a very successful book. Mr. Daniel, in his treatise on Negotiable Paper,³ maintains that a drawee, who pays or accepts a forged bill, should be permitted to recover the money paid or to resist his acceptance, for the reason that the holder, who presents a bill to the drawee for payment or acceptance, "represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance or payment, as such. If he indorses it, he warrants its genuineness; and his own assertion of ownership is a warranty of genuineness in itself." But, with all deference, this criticism, and the similar criticism of Mr. Justice Chambre in his dissenting opinion in *Smith v. Mercer*,⁴ spring from a false analogy. One who transfers a bill or any chattel, whether by way of sale or in payment of a debt, does indeed represent that the thing sold or exchanged is his, and also what it purports to be. To use the common expression, he impliedly warrants his title and the genuineness of the thing transferred. Accordingly, if it is not genuine, the vendee may recover his purchase-money, or the creditor may treat his debt as still unpaid.⁵

¹ *Ellis v. Ohio Co.*, 4 Oh. St. 628, 668. See to the same effect *Nat. Bank v. Bangs*, 106 Mass. 441; *Danvers Bank v. Salem Bank*, 151 Mass. 280; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rouvant v. San Antonio Bank*, 63 Tex. 610. The French law is the same. ² *Pardessus, Cours de Droit Comm.* (3d ed.) § 505; ³ *Bédarride, Lettre de Change* (2 ed.), § 377.

But see *contra*, *Howard v. Mississippi Bank*, 28 La. An. 727; *Comm. Bank v. First Bank*, 30 Md. 11; *Salt Bank v. Syracuse Inst.*, 62 Barb. 101; *St. Albans Bank v. Farmers' Bank*, 10 Vt. 141. It would not be surprising if these last four cases should not be followed even in the jurisdictions in which they were decided.

⁴ *First Bank v. Ricker*, 71 Ill. 439; *Nat. Bk. v. Bangs*, 106 Mass. 441, 444-5. For like decisions in analogous cases see *Martin v. Morgan*, 3 Moore, 635; *City Bank v. Burns*, 68 Ala. 267 (*semble*); *Peterson v. Union Bank*, 52 Pa. 206. See also *Whistler v. Foster*, 14 C. B. N. S. 340.

⁵ Vol. II. (3d ed.) § 1361.

⁶ *Taunt. 76.*

⁷ *Jones v. Ryde*, 5 *Taunt.* 488; *Young v. Cole*, 3 *Bing. N. C.* 724; *Gurney v. Womersley*, 4 *E. & B.* 133; ² *Ames, Cas. B. & N.* 242, n. 1, 633, n. 1.

But the attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainer. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect, says: "Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment." Mr. Justice Chambre's statement, that the holder warrants the genuineness of the bill by presenting it, was expressly repudiated by Littledale and Bayley, JJ., in *E. I. Co. v. Tritton*.¹ The notion, that the holder's indorsement of his name on the bill at the time of payment is a warranty of the genuineness of the bill, although not without judicial sanction,² should be strenuously resisted. The so-called indorsement is not an indorsement at all, but simply a receipt of payment.³

Wherever *Price v. Neal* is recognized as law, we should expect to find that one who paid a bill or note on which his own name was forged could not recover the money from an innocent holder for value. The authorities, with a single exception, permit the holder to retain the money.⁴

In order to test the soundness of the principle upon which Lord

¹ 3 B. & C. 289, 290-1. See to the same effect *Wilkinson v. Johnston*, 3 B. & C. 428, 436; *Bernheimer v. Marshall*, 2 Minn. 78, 84; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141, 146-7. The distinction between a sale and a payment of a bill is pointedly taken in *Corn Bank v. Nassau*, 91 N. Y. 74, 80.

² *Nat. Bank v. Bangs*, 106 Mass. 441; *People's Bank v. Franklin Bank*, 88 Tenn. 299.

³ See Story, Prom. Notes (7th ed.), 526, n. 5.

⁴ *Mather v. Maidstone*, 18 C. B. 273; *Young v. Lehman*, 63 Ala. 519, 523; *Tyler v. Bailey*, 71 Ill. 34, 37; *Allen v. Sharpe*, 37 Ind. 67, 73; *Third Bank v. Allen*, 59 Mo. 310, 315; *Lewis v. White's Bank*, 27 Hun, 396; *Johnston v. Bank*, 27 W. Va. 343; *Banca Nazionale v. Giacobini, Cassaz. di Torino* (1871), cited in Famone, Il Codice Civile, 454-5; 2 Pardessus, Cours de Dr. Comm. (3d ed.), § 505; 2 Bédarride, Lettre de Change (2d ed.), § 380. See also *Bank of U. S. v. Bank of Ga.*, 10 Wheat. 333; *Cook v. U. S.*, 91 U. S. 389, 396-7; *Gloucester Bank v. Salem Bank*, 17 Mass. 33. The exceptional case *contra*, *Welch v. Goodwin*, 123 Mass. 71, is not to be supported. It was decided almost wholly upon the authority of *Carpenter v. Northborough Bank*, 123 Mass. 66, which was a totally different case. In this last case, the plaintiff made a note payable to A, and gave it to B for the latter's accommodation, upon the understanding that A should also indorse for B's accommodation. B forged A's name as indorser and discounted the note with the defendant, to whom the plaintiff paid it when due. The title of the note obviously never passed from the plaintiff. The defendant, therefore, obtaining the money by the wrongful use of the plaintiff's property, must hold the money as a constructive trustee for the plaintiff, who accordingly rightly recovered it from the defendant. *Talbot v. Rochester Bank*, 1 Hill, 295; *Arnold v. Cheque Bank*, 1 C. P. D. 578, were similar cases.

Mansfield proceeded in *Price v. Neal*, it will be well to consider some analogous cases clearly within his principle, but to which the reasons commonly assigned for the decision in that case are inapplicable.

The case of *Leather v. Simpson*¹ is especially valuable for our present purpose. The defendant had discounted for the drawer certain bills of exchange, to which bills of lading were attached. The plaintiff, the drawee of the bills of exchange, paid them to the defendant on the faith of the bills of lading. The bills of lading turned out to be forged. The plaintiffs then sought to recover the money as money paid by mistake, but failed. There was, confessedly, no actual negligence in the case. No one will assert that the drawer was conclusively presumed to know the captain's signature to the bills of lading. The defendant gave up no rights against prior indorsers, for there were none. The gist of the opinion of Malins, V. C., is thus stated by him:—

The equities between these parties are equal; the parties are equally innocent in the transaction; they have all been imposed upon; but there is this difference, that one of them, by the course of the transaction, has been in possession of the money, and I am at a loss to see any ground upon which I can be justified in making a decree that that money should be returned.

The Vice-Chancellor in this case, and Lord Denman in the similar case of *Robinson v. Reynolds*,² where the drawee was compelled to pay his acceptance, repudiated the drawee's claim that the holder, by presenting the bills of exchange with the bills of lading attached, warranted the genuineness of the latter.³ The decisions in this country accord with *Leather v. Simpson* and *Robinson v. Reynolds*.⁴

The principle that, when a loss must fall upon one of two in-

¹ 11 Eq. 398.

² 2 Q. B. 196.

³ *Baxter v. Chapman*, 29 L. T. Rep. 642; *Goetz v. Bank*, 119 U. S. 551, *accord*.

⁴ *Goetz v. Bank*, 119 U. S. 551; *Hoffman v. Bank of Milwaukee*, 12 Wall. 181; *Young v. Lehman*, 63 Ala. 519; *First Bank v. Burnham*, 32 Mich. 323; *Craig v. Sibbett*, 15 Pa. 240; *Randolph v. Merchants' Bank*, 7 Baxt. 456. In the Michigan case, Cooley, J., said: "The best view that can be taken of this case for the plaintiffs below is, that there was a mutual mistake of fact under which the bank discounted and the drawees paid the bill. Conceding this, why should the drawees be allowed to transfer the loss to the bank? Usually when one of two parties, equally innocent, must suffer, the law leaves the loss where it has chanced to fall."

nocent parties having equal equities, the one who has the legal title will prevail, is conspicuously illustrated by another class of cases strongly resembling the one just considered. *Aiken v. Short*,¹ *Heurtematte v. Morris*,² *Fort Dearborn Bank v. Carter*,³ *Southwick v. First Bank*,⁴ and the like, decide, that the payee of an order or bill of exchange, who takes the same either by way of purchase or on account of a debt due to him from the drawer, and who afterwards procures its acceptance or payment by the drawee, may enforce the acceptance or keep the money, although the drawee was induced to accept or pay by the fraudulent representations of the drawer. This doctrine is a familiar one in the continental law.⁵ Duranton first considers the case where the payee was a creditor of the drawer, and remarks that the "Roman law not only denied the drawee's right to recall what he had paid on his acceptance, although induced by mistake, but also allowed him no defence to an action upon his promise, and that, too, although he accepted in consequence of the fraud and chicanery of the drawer." He then points out that if the payee were a volunteer he could not keep the money or enforce the promise, because in such a case "the payee is not fighting to avoid a loss, but rather to make a profit, and the drawee, on the other hand, is fighting to avoid a loss. . . . Whereas, when the payee is a creditor of the drawer, *versaretur in damno*, if the drawee could refuse to perform his promise or could recall his payment."

In like manner the assignee of a chose in action, who acquires it by purchase or on account of a debt due him from the obligee, and who collects the claim from the obligor, may keep what he has got, although the obligor paid in ignorance of the fact that he had a valid defence to the enforcement of the claim; e.g., fraud,⁶ illegality,⁷ failure of consideration,⁸ payment,⁹ set-off,¹⁰ and the like.

¹ 1 H. & N. 210; *Walker v. Conant*, 69 Mich. 321, *accord.*

² 101 N. Y. 63.

³ 152 Mass. —, 25 N. E. Rep. 27.

⁴ 84 N. Y. 420.

⁵ 12 Duranton, *Cours de Droit Français*, § 332; Gide, *Novation*, 421; Erxleben, *Condiciones sine Causa*, 156 *et seq.*; 3 Endemann, *Handbuch d. Handels-, See- und Wechselrechts*, 1102, 1115.

⁶ *Merchants' Co. v. Abbott*, 131 Mass. 397.

⁷ *Atty.-Gen. v. Perry, Comyns*, 481, is *contra*. But this case is not likely to be followed, unless as a revenue decision.

⁸ *Youmans v. Edgerton*, 91 N. Y. 403.

⁹ *Mar v. Callander*, Mor. Dict. 2927; *Ker v. Rutherford*, Mor. Dict. 2928; *Duke v. Halraig*, Mor. Dict. 2929.

¹⁰ *Franklin Bank v. Raymond*, 3 Wend. 69, citing *Price v. Neal*.

The case of *Merchants' Co. v. Abbott* is a typical one. Certain buildings, insured in the plaintiff company, were set on fire by the owner and destroyed. The owner then assigned the policy of insurance to the defendant, to whom the plaintiff paid the amount of the adjusted loss, both parties being ignorant of the owner's fraud. The defendant was allowed to keep the money. In *Mar v. Callander*, a creditor, who had been paid by the debtor's chamberlain, assigned his debt to the defendant; a new chamberlain, who was ignorant of the payment by his predecessor, paid the debt to the defendant. Here, too, the defendant prevailed.

Consistently with the cases hitherto considered, if a drawee pays a bill of exchange, erroneously supposing that the amount to the credit of the drawer is sufficient to meet the bill, he ought not, upon discovering his mistake, to recover the money paid from the holder. Such is the law in England and several of our States.¹ In *Chambers v. Miller*, the mistake was discovered while the holder was still at the bank-counter; but the court held that the money was irrevocably his. In Massachusetts, if not also in New York, the holder is not permitted to keep the money, unless he has changed his position before notice of the mistake.² The decisions in those States, it is submitted, are inequitable. Either the holder or drawee must suffer by the misconduct of the drawer in drawing without funds. If the holder has once got the money, there seems to be no reason why a court should take it from him. Furthermore, it seems impossible to reconcile these decisions with those discussed in the preceding two paragraphs and decided in the same jurisdictions. In *Fort Dearborn Bank v. Carter*,³ the court was evidently embarrassed by its decisions in favor of the drawee

¹ *Davies v. Watson*, 2 Nev. & M. 709; *Chambers v. Miller*, 13 C. B. n. s. 125; *Woodland v. Fear*, 7 E. & B. 519, 521; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Nat. Bank v. Burkhardt*, 100 U. S. 686; *Preston v. Canadian Bank*, 23 Fed. Rep. 179; *City Bank v. Burns*, 68 Ala. 267; *Nat. Bank v. McDonald*, 51 Cal. 64 (*semble*); *First Bank v. Devenish* (Colo., 1890), 25 Pac. R. 177; *Peterson v. Union Bank*, 52 Pa. 206; *Hull v. Bank, Dudley* (S. Ca.), 259. So in Germany. *Postfiscus v. Imhof* (Reichs-Gericht, 1889), 44 Seuffert's Archiv, No. 257; *Anon.* (O. L. G., Hamburg, 1887), 43 Seuffert's Archiv, No. 212.

² *Merchants' Bank v. Eagle Bank*, 101 Mass. 251; *Merchants' Bank v. Nat. Bank*, 139 Mass. 513 (but see *Boylston Bank v. Richardson*, 101 Mass. 287); *Troy Bank v. Grant, Hill & D.* 119; *Irving Bank v. Wetherald*, 36 N. Y. 335; *Whiting v. City Bank*, 77 N. Y. 363 (*semble*); *Nat. Bank v. Steele*, 11 N. Y. Sup. 538 (but see *Oddie v. Nat. Bank*, 45 N. Y. 735).

³ 152 Mass. —. 25 N. E. Rep. 27.

who paid, by mistake, overdrafts. They were disposed of as follows:—

Whatever may be the distinction between such a case as *Merchants' Bank v. Nat. Bank*¹ (the case of an overdraft paid by mistake), and the case of *Ins. Co. v. Abbott*,² it is manifest the making of a contract or the payment of money under a mistake of fact, as these words are used in the law, is not always followed by the same consequences as the making of a contract or the payment of money in consequence of the fraudulent misrepresentation of a third person.

This can hardly be regarded as the court's last word upon the subject. It is believed that no convincing reason can be found for discriminating, as the Massachusetts and New York courts do, against a drawee, who has been misled by the fraud of the drawer, and in favor of a drawee, who has acted under a mistake.

One who believes in Lord Mansfield's principle that, when one of two innocent persons must suffer by the misconduct of a third, the loss should lie where it has fallen, is destined to disappointment, as he reads the American cases bearing upon the right of the holder, to whom the drawee has paid a bill, which has been altered after its issue by the drawer. If a holder has in good faith purchased a bill, of which the amount has been raised, and the drawee has in like good faith paid it, the payment, it would seem, should have the same effect in favor of the holder, as the payment of a bill on which the drawer's name is forged, or the payment of a bill on the faith of forged bills of lading, or the payment of a bill induced by the drawer's fraud, or of one drawn without funds. Nevertheless, the right of the drawee to recover the money paid upon an altered bill is asserted by many decisions in this country.³ One who disagrees with these decisions must turn for comfort to the English and continental law. There is, it is true, no express English decision recognizing the holder's right to keep the money paid in such a case, but that the holder need not refund, seems to be a fair inference from *Langton v. Lazarus*.⁴ In France, Germany,

¹ 139 Mass. 513.

² 131 Mass. 397.

³ *Espy v. Bank*, 18 Wall. 604; *Young v. Lehman*, 63 Ala. 519, 523; *Redington v. Woods*, 45 Cal. 406; *Park v. Roser*, 67 Ind. 500; *Merchants' Bank v. Exchange Bank*, 16 La. 457; *Third Bank v. Allen*, 59 Mo. 310; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Bank of Commerce v. Nat. Association*, 55 N. Y. 211; *Marine Bank v. Nat. Bank*, 59 N. Y. 7; *White v. Continental Bank*, 64 N. Y. 316; *Security Bank v. Bank of Republic*, 67 N. Y. 458; *Nat. Bank v. Westcott*, 89 N. Y. 418; *Nat. Bank v. Seaboard Bank*, 114 N. Y. 28 (*semble*); *City Bank v. Nat. Bank*, 45 Tex. 203.

⁴ 5 M. & W. 629.

Belgium, Switzerland, Italy, Hungary, and Russia it is unquestioned law, that a drawee, who accepts or pays an altered bill, must honor his acceptance, and cannot recover what he has paid.¹

Upon whom finally should the loss fall, when a party to a bill or note pays it to a holder, who could maintain no action against the payor, because one of the indorsements in his chain of title is a forgery? Here, too, it may be urged, the equities are equal, and the holder, having obtained the money, should keep it. But this case differs in an important particular from all the cases hitherto considered, and another principle comes into play, which overrides the rule as to equal equities. In all the other cases the bill or note, however valueless it may have been, belonged to the holder. In the case of the forged indorsement, on the other hand, the bill or note belongs, not to the holder, but to him whose name was forged as indorser. The holder, who bought the bill, was therefore guilty of a conversion, however honestly he may have acted. When he collected the bill, inasmuch as he obtained the money by means of the true owner's property, he became a constructive trustee of the money for the benefit of the latter. The true owner may therefore recover the money as money had and received to his use.² If he recovers in his action, the property in the bill would pass to the holder; but the bill would be of no value to him, for, if he should seek to collect it, he would be met with the defence that it had been paid to him once already. If, on the other hand, the true owner prefers to proceed on the bill against the maker or acceptor, he may do so, and the prior payment to the holder, being made to one without title, will be no bar to the action. The maker or acceptor, however, who pays to the true owner, is entitled to the bill, and should be subrogated to the owner's right to enforce the constructive trust against the holder, and could thereby make himself whole. Consequently, whatever course the true owner elects to pursue, the loss must ultimately fall on the holder. As a matter of positive law, the maker or acceptor, who pays the holder claiming under a forged indorsement, is allowed to proceed against the latter directly, without first paying the true owner.³ This, as a matter of

¹ *x Nougier, Lettre de Change* (4 ed.), § 325; *2 Pardessus, Cours de Dr. Comm.* (3 ed.), § 506; *Wächter, Wechselrecht*, 481, giving the text of the commercial codes of the countries above mentioned.

² *Bobbett v. Pinkett*, 1 Ex. Div. 368, 372; *Indiana Bank v. Holtsclaw*, 98 Ind. 85; *Buckley v. Second Bank*, 35 N. J. 400; *Johnson v. First Bank*, 6 Hun, 124.

³ *1 Ames Cas. on B. & N.* 433, n. 2; *Star Co. v. N. H. Bank*, 60 N. H. 442; *Corn*

legal reasoning, is believed to be unwarranted. But as, in the result, the loss comes, where upon the principle of subrogation it ought to come, it is not worth while to be too critical.

The principle by which, in a controversy between two persons having equal equities, the holder of the title shall prevail, is most commonly applied for the benefit of a purchaser, who buys a title, without notice of equities attaching to it, in the hands of the seller, in favor of a third person.¹ There is, it must be admitted, one difference between this case of the purchaser and those already discussed, in which the holder of a bill received and the drawee made payment, both acting under the mistaken belief that the bill was genuine and properly payable by the drawee to the holder. The purchaser parts with his money at the time he acquires the legal title, which he claims the right of retaining. The holder, on the other hand, unless there are prior indorsers, gives up nothing of value at the time when he acquires from the drawee the money, which he seeks to keep. He parted with his money in a prior transaction, when he obtained the worthless bill. At that moment the loss has fallen upon the holder, and it has been said that he "ought not to be permitted to throw that loss upon another innocent man, who has done no act to mislead him."² But this view

Bank *v.* Nassau Bank, 91 N. Y. 474. Analogous to these cases of forged indorsement are those where the defendant buys a stock certificate, transferred to him by a forged power of attorney, and then surrenders it to the company, taking out a new certificate in his own name. The title of the true owner is not affected thereby. The defendant, having obtained the new certificate by means of the original one of the true owner, holds the new one as a constructive trustee for the latter. The company would be bound to issue a fresh certificate to the true owner, but would of course be entitled to have the one outstanding, to which the original shareholder is equitably entitled, delivered up. So that the loss must fall on the innocent purchaser. Sims *v.* Anglo-Am. Co., 5 Q. B. D. 188; Metrop. Bank *v.* Meyer, 63 Md. 6. The case of Boston Co. *v.* Richardson, 135 Mass. 473, seems to have gone too far in holding the innocent purchaser liable on an implied warranty of title. The same criticism may be applied to Merchants' Bank *v.* First Bank, 3 Fed. Rep. 66, — a case of forged indorsement, — which was said in Leather Bank *v.* Merchants' Bank, 128 U. S. 26, 37, to proceed "upon grounds inconsistent with the principles and authorities above stated." In the last case the drawee's right, to recover of the holder under a forged indorsement, was held to be barred in six years from the time of the payment. This decision, on the theory of subrogation, is clearly right. But, if the case is regarded as an illustration of the right to recover money paid under mistake, it is not to be reconciled with the prevailing doctrine, that the cause of action does not accrue against an innocent receiver until demand, or notice of the mistake.

¹ In 1 HARV. L. REV. 3, 4, *et seq.*

² Per Chambre, J., in Smith *v.* Mercer, 6 Taunt. 76, 84.

seems specious, rather than sound. From the point of view of natural justice, the time of the loss is immaterial.¹ If one looks at the fraudulent transaction in its entirety, the equality of the equities between the holder and the drawee is just as obvious as the equality of the equities between the purchaser and the equitable incumbrancer. One or two additional illustrations may be put:—

A creditor sells his claim to A, and afterwards, concealing this sale, sells the claim to B, who in good faith collects it of the debtor. B paid his money for nothing, but surely he ought to be allowed to keep what he has collected, although received after he suffered his loss, and although the loss is thereby thrown on the equally innocent A.²

Again: A third mortgagee buys the first mortgage in ignorance of the second. The second mortgagee, in justice, cannot prevent the third from tacking his two mortgages, although the second is thereby "squeezed out."³

Another example is found in the singular case of London Bank *v.* London Co.⁴ Some negotiable bonds were stolen from the defendant's box and sold to the plaintiff, a *bona fide* purchaser. The thief, fearing detection, afterwards, by fraud, got them again from the plaintiff and replaced them in the box of the defendant, who did not learn till later of the theft or replacement of the bonds. The

¹ If, for instance, the money paid by the drawee to the holder should by mistake be repaid to the drawee, the latter could keep it. This happened in *Second Bank v. Western Bank*, 51 Md. 128, where the loss first fell on the holder, who bought a bill drawn without funds; the loss was then thrown upon the drawee by the latter's paying the bill by mistake; but was finally cast upon the holder by his mistake in refunding to the drawee.

² In *Judson v. Corcoran*, 17 How. 612, Catron, J., said, p. 614: "The case is one where an equity was successively assigned in a *chase in action* to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here C. [the junior assignee] has drawn to his equity a legal title to the fund, which legal title J seeks to set aside. . . . Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." See to the same effect *Mercantile Co. v. Corcoran*, 1 Gray, 75; 40 Seuffert's Archiv, No. 103; 13 id. No. 246; 24 id. No. 234; 31 id. No. 27; 3 Stobbe, Handbuch d. deutschen Privatrechts, 181; Knorr, 42 Archiv für die Civilistische Praxis, 318. In Germany, as generally in the United States, the mere fact, that the second assignee first notifies the debtor of his assignment, does not defeat the precedence of the first assignee; but in France, as in England, priority of notice determines the rights of successive assignees.

³ A wider generalization has convinced the writer that his opinion to the contrary in 1 HARV. L. REV. 15 is erroneous. But the English doctrine, which permits tacking by the third mortgagee, even when he has notice of the second mortgage, as in *Taylor v. Russell* (1891), 1 Ch. 8, seems as indefensible as ever. Such a case is hardly to be distinguished from the cases where the holder of a bill collects it with knowledge that it is forged, or drawn without funds, and that the drawee is acting under a mistake. *Supra*, p. 301, n. 2.

⁴ 21 Q. B. Div. 535.

court gave judgment against the plaintiff, on the ground that the defendant was a purchaser for value without notice. It requires a considerable effort of the imagination to find here the elements of a purchase. But the decision seems clearly right, for the equities were equal, and the defendant had the bonds. Here, too, as in the preceding two instances, the loss, which first fell on the defendant, was afterwards transferred to the plaintiff.

The rule as to equal equities is also applicable, although the holder of the legal title parts with his money, neither before nor contemporaneously with its acquisition, but subsequently thereto. If, for example, a plaintiff pays and the defendant receives money, supposed by both to be due from the defendant, but really due from X, and the mistake is not discovered until the claim against X is barred by the Statute of Limitations, or has become worthless by the insolvency of X, the defendant can keep the money. The rule is the same, if the defendant's pecuniary position has become changed in other ways, in consequence of the receipt of the money. Here, again, both parties are innocent, and one of them must suffer; but the defendant, having the legal title to the money, prevails.¹

It is hoped that what has been written may serve to convince the reader of the extensive scope of the doctrine that equity will not interfere as between two persons having equal equities, but will let the loss lie where it has fallen. It will certainly be a satisfaction to the writer, if he has helped to vindicate the opinion of Lord Mansfield in *Price v. Neal* from the false gloss that has been put upon it by his successors.

J. B. Ames.

CAMBRIDGE.

¹ *Brisbane v. Dacres*, 5 Taunt. 144; *Skyring v. Greenwood*, 4 B. & C. 281; *Watson v. Moore*, 33 Law Times, 121; *Union Ass'n v. Kehlor*, 7 Mo. Ap. 150; *Mayer v. State Bank*, 8 Neb. 104, 109; *Union Bank v. Sixth Bank*, 43 N. Y. 452; *Mayer v. Mayor*, 63 N. Y. 253; *White v. Continental Bank*, 64 N. Y. 476; *Curren v. Mayor*, 79 N. Y. 511, 515; *Beam v. Copeland*, Texas, 14 S. W. R. 1094; *Union Bank v. Ontario Bank*, 24 Low. Can. Jur. 309; *Pothier, Obligations*, No. 256; 13 Duranton, *Cours de Droit Français*, § 685. The principle was clearly stated in *Kingston Bank v. Eltinge*, 40 N. Y. 391, but strangely misapplied, the court considering that the plaintiff had the legal title, although the money had been paid to the defendant by the plaintiff's consent. If land had been conveyed, instead of money, it is hardly to be supposed that the court would have treated the legal title as being in the plaintiff; but there is obviously no difference between the two cases in principle. *Durrant v. Eccles Commissioners*, 6 Q. B. D. 234, is difficult to explain, unless, by reason of the relative positions in life of the parties, the defendant should be held responsible for the consequences of the mistake.

THE CASE OF GELPCKE v. DUBUQUE.

[In assenting to a request to furnish the following paper for publication, the writer is aware that the form of it requires a word of explanation. In examining a disputed or obscure case it is sometimes found convenient, at Law Schools, to give the case out for argument at a Moot Court, as if upon a rehearing. Such a proceeding often involves anachronisms, e. g., in the citation of later cases; but it has its advantages. The case of *Gelpcke v. Dubuque* (1 Wall. 175) was thus given out lately, here at Cambridge, and what follows was read, last June, as the opinion of the court in deciding that case. The writer is the more willing to have it printed, because, in sustaining the doctrine of the court, as an original question, he found himself arriving at an unexpected result, and also because the opinion here given makes one or two suggestions which appear to him important, and, at the same time, to be less insisted upon in the discussion of this case than they should be. Probably the general judgment of the legal profession would be that the opinion in *Gelpcke v. Dubuque* was a very inadequate one. Certainly it was a great while before the Supreme Court, in its steady adherence to the rule laid down in that case, succeeded in commanding it to the approval of the profession. Among the many keen and able criticisms of this rule, reference may be made to those of Mr. Justice Holmes, in his notes to the twelfth edition of Kent's Commentaries; to an article attributed to Hon. John M. Reed, late Chief-Judge of Pennsylvania, in 9 American Law Review, 381; to Mr. G. W. Pepper's "Border Land of Federal and State Decisions;" and to Mr. W. M. Meigs's articles in 29 Central Law Journal, 465, 485, on certain questions growing out of what he designates as "the Federal doctrine of 'General Principles of Jurisprudence.'" — J. B. T.]

THIS case comes up on error to the District Court of the United States for Iowa, where a demurrer to the defendant's answer was overruled and judgment given for the defendant. The suit was brought to recover the amount of coupons on certain bonds of the defendant city, issued under color of authority from an act of the Legislature of Iowa. It was brought in the United States court by the plaintiffs, who are not citizens of Iowa, under those provisions of the Constitution and laws of the United States, by which persons who are not citizens of a State where they wish to sue one who is such a citizen, are permitted to avoid the danger of a possible bias and prejudice in the State courts in favor of their own people, by proceeding in a national tribunal sitting within that State. The defence was that the bonds were unlawfully issued, in that the Constitution of Iowa forbids the Legislature to create debts exceeding one hundred thousand dollars; and it is alleged that at the time of the statute authorizing these bonds, the indebtedness of the State and of the municipalities of the State exceeded

this amount. There were other grounds of this alleged unconstitutionality, but it is not needful to mention them.

The bonds were issued in 1857, in aid of a railroad company, and were payable to bearer, in New York, with a series of half-yearly coupons. The city was authorized to lay special taxes to pay the interest. For several years before they were issued, the Supreme Court of Iowa, in deciding other litigated cases like the present one, had upheld the constitutionality of similar issues of bonds. There were other statutes and other decisions of a similar character during several years after the bonds now in question were issued. At the time of bringing the present action, and long after the issue and negotiation of these bonds, namely, in 1862, the Supreme Court of Iowa had reversed its previous course of decision, and had held that the bonds were invalid, as being forbidden by the State constitution. In 1863 the present case came up to the Supreme Court of the United States, on error, and the judgment of the District Court overruling the plaintiff's demurrer and holding for the defendant was overruled, Mr. Justice Miller alone dissenting. The main struggle in the case, as it was argued in the Supreme Court, was over the question of following the State court in its decisions interpreting its own constitution. It was insisted, on behalf of the defendant, that the United States courts, in exercising their jurisdiction founded on the citizenship of parties, only administers the law of the State; and that in determining what the law of the State is, the United States courts are bound to follow the settled construction of the State courts, whether on a point of statute law or of common law. On the other side, it was urged that the law upon this matter now in issue was not settled in Iowa, or if it were settled, that the settled law was that of the earlier decisions; that so recent a decision as this of 1862, reversing the others, could not be held to have settled the law the other way; and the court was invited to examine the question anew and settle it for itself. But the court, speaking through Mr. Justice Swayne, while plainly indicating its approval of the older decisions, and its disapproval of the last one, and while stating its own view that the new opinion had not settled the law, nevertheless declined to go into the question of whether the earlier decisions were right, or to examine the question at all, or to follow any rule which required them, in such a case as the present, to adhere to the decision of the State courts;

and they proceeded to lay down the important principle that where the law of the State was settled, at the time the bonds were issued, in favor of the legal validity of the bonds, they could not afterwards be held invalid, even by a court which should be of opinion that the former construction of the constitution was wrong. This proposition, first established in the present case, has since, against much opposition and criticism, been steadily followed in the Supreme Court. Indeed, within a few years after the decision of the present case, which was at the December term, 1863, the Supreme Court declared that the question was no longer open to controversy before them.

The case has now been argued as upon a rehearing. It comes up as if we were dealing with it just after it had been decided in the Supreme Court of the United States, at a time when, if sufficient reason should appear, the former decision might be reversed. Is this proposition, then, in the case of *Gelpcke v. Dubuque*, a sound one and rightly applied? In order to determine that question we must first take several matters clearly into account.

There is a well-known difference in the way in which cases may be brought into the United States courts. (*a*) They may come there because the case involves a question under the Constitution, treaties, or laws of the United States. In such cases the United States Supreme Court is the ultimate tribunal of appeal, whether the case has come up from a State court or from an inferior court of the United States. It has no duty of following the laws of the States, for it is now administering the law of its own government. If, in such a case, there be a question of impairing the obligation of a contract, and the State court has held that there is no contract to be impaired, the Supreme Court may reëxamine that question with entire freedom, although it involve the construction of the constitution or statutes of the State; it is not in any way bound to follow the decision of the State court. Such an unfettered power is necessary in order to the full exercise of the jurisdiction of the Supreme Court. In the case of the *Ohio Company v. Debolt*, 16 How., at p. 432, on error to the Supreme Court of Ohio, Chief Justice Taney, speaking, probably, for a majority of the court, remarked: "The duty imposed upon this court to enforce contracts . . . would be vain and nugatory if we were bound to follow those changes in judicial

decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a State court would be no protection to a contract if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for revision here." (b) But there is another ground for coming into the courts of the United States. A case may come there, as this one has, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case the court is administering the law of the State. In this sort of case the general rule is, that, since the court is applying the law of the State, it will follow, in determining what that law is and in construing it, the decisions of its highest court. If the question has not ever come up in the State court, or if there be no settled rule there, the United States court must, of course, decide for itself. But, even after such an independent decision has been made, if the highest court of the State should arrive at a different conclusion, the United States court will, in general, change from its own previous decision, and will adopt that of the State courts.¹ Nothing could more plainly mark the secondary character of the jurisdiction of United States courts in this region of it.

But there are various qualifications of these doctrines. The most conspicuous of them is the principle of *Swift v. Tyson*, 16 Pet. 1 (1842), in which the novel and much-contested doctrine was laid down, that upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the State courts. This declaration was not required for the decision of that case, but it has been followed, and is an established rule of the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day. The same principle is laid down as regards the construction of ordinary language (*Lane v. Vick*, 3 How. 464, 476); but in that case there was a strong dissenting opinion of McKinley, J., concurred in by Taney, C. J. Again, when the United States court has already decided a question, and a later decision of the State differs from this, the United States court may at least wait awhile before chang-

¹ *Green v. Neal's Lessee*, 6 Pet. 291; *Carroll County Supervisors v. United States*, 18 Wall. 71.

ing its own decision.¹ And, finally, it was long ago intimated that a United States court would not follow the State decisions where these were regarded as biased, and unjust to citizens of other States. It will easily appear that in some sense and to some extent there should be a recognition of such a principle as the one just named; all State courts must keep within the line of reason in order to make it just that the United States courts should follow them. Yet, notwithstanding all these qualifications, it is still true, and is recognized as the sound general principle in the class of cases now under discussion, that the courts of the United States will follow the decisions of the State courts in ascertaining and construing their own law. The declarations to this effect are many and emphatic.²

It is with one of the qualifications of this rule that we are concerned in this case, namely, the one arising out of the danger to citizens of other States from local prejudice. I have said that some power of varying from the decisions of the States must necessarily exist, as regards this sort of case, that, at least, the local courts must keep within the limits of reason. Shall the range of the United States court, in differing from the local tribunals, go farther than that, and how much farther?

In *Rowan v. Runnels*, 5 How. 139 (a case coming up from the Circuit Court of the United States for Mississippi), Chief Justice Taney remarks: "We ought not to give to them [the decisions of State courts] a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For if such a rule were adopted . . . it is evident that the provision in the Constitution of the United States which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory." This is the assertion of a right, which is, indeed, an obvious one, to depart from the State court's construction of the local law, in so far as is necessary to prevent the annulling of that protection for citizens of other States which the Constitution was intended to secure. For, although the courts of the United States in this sort of case have to apply the

¹ *Shelby v. Guy*, 11 Wheat. 361.

² *Elmendorf v. Taylor*, 10 Wheat. 152, 159-60; *Webster v. Cooper*, 14 How. 488, 502-5; *Neamith v. Sheldon*, 7 How. 812; *Williamson v. Berry*, 8 How. 495, 558; *Leffingwell v. Warren*, 2 Black, 599.

State law, it is to be remarked that they *are* courts of the United States, and not courts of the State. Why is it that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it? It was because, in controversies between its own citizens and those of other States or countries, it might be expected that the courts of any given State would not be free from bias. Accordingly we read, in No. 80 of the "Federalist," the very striking statement of Hamilton as regards the danger that might come from unjust decisions of the several States as against foreigners and citizens of other States, and the importance of that jurisdiction of the Federal courts which we are now considering: —

The responsibility for an injury, he says, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body. . . . It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence

to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

To come back, now, to the question how far the United States courts may go in refusing to follow the decisions of the State courts. Shall they be limited merely to the prevention of results which would be absurd and irrational, or may they properly go farther? As I have already said, in this class of cases, as in all others, whenever a question develops which involves the law of the United States, the United States court must, as touching that, act independently, although its ground of jurisdiction over the case was originally merely the citizenship of the parties. But suppose no question of that kind to arise. That is the fact in the present case; this case, if originally brought in a State court, could not have been carried up to the Supreme Court of the United States, because it does not involve any question of a "law" impairing the obligation of contracts.¹ The lower United States courts, as we have seen, deal with such cases, because they have concurrent jurisdiction with the State courts on the ground of the citizenship of the parties; and, having regard to the reason that they are given this concurrent jurisdiction, namely, the danger of injury to citizens of other States or countries, by reason of the bias of the State courts, it may be laid down that wherever State courts are likely to be under a local bias, adverse to the citizens of other States or countries, the United States courts must hold themselves at liberty to depart from the decisions of the local courts in construing and applying the local law and the local constitution, to look into the question for themselves, and to adopt their own rules of administration. This appears to be only a just assertion of the power intended to be given to these courts by the Constitution of the United States, in dealing with the class of cases now under consideration. To this effect is the reasoning of Mr. Justice Bradley, speaking for the court, in *Burgess v. Seligman*, 107 U. S. 20 (1882).

Assuming this to be so, we have thus far only determined that the United States courts will look into such questions for themselves. The statement of Chief Justice Taney in the case of *Rowan v. Runnels*, above quoted, did not go beyond this. But in the case of *Gelpcke v. Dubuque*, the Supreme Court flatly refused

¹ *Railroad Company v. McClure*, 10 Wall. 511.

to look into the merits of the question at all; and, in declining to follow the later decision of the Iowa court, a rule was laid down which established the validity of the bonds, irrespective of any opinion whether, as an original question, they were lawfully and constitutionally issued or not. The Supreme Court, quoting substantially an *obiter* remark of Taney, C. J., in *Ohio Co. v. Debolt*, 16 How., at p. 432, put forward this proposition: —

The sound and true rule is that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.¹

Has the United States court any right to say this? To announce that it will not look into the question, whether the bonds were originally authorized by the State constitution or not? Any right to say that although, in this court's judgment, it may be true, as an original question, that they were issued in violation of the State constitution, the court will still hold them to be valid?

With a certain qualification, I think that it has. The laying down of some rule of administration is legitimate, for the court, as we see, has the right to look into the question for itself; and all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation. If this rule in *Gelpcke v. Dubuque* be understood, as it was probably meant, as being subject to a certain qualification, it appears to me good. It will not do, of course, to allow the United States courts, through the medium of any principle of presumption or judicial administration, or anything else, to sanction a violation of the State constitution or the State laws. There might be a case wherein the violation of the constitution was gross and palpable, and such that those who took part in it, whether in making contracts or doing anything else, must be held to have known what they were doing; and in such a case no court would be justified in laying down a rule that would protect these parties. But courts often have to recognize, especially

¹ 1 Wall. 206.

in the region of constitutional law, that there is more than one reasonable and allowable interpretation of a thing. It is familiar that they will not set aside the interpretation put upon the constitution by a coördinate legislature, in enacting a law, unless the mistake be very plain indeed,—so plain (in the ordinary phrase used in such cases) as to be beyond reasonable doubt. If the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, *and which came within a permissible interpretation of the State constitution and law*, will be sustained in the United States courts, I think that it is a sound one, and should be upheld. It is a rule which the State court should accept; and if the adoption of it by the United States court lead to resistance on the part of the State authorities, that is a result which must be submitted to and dealt with as may be possible. Such temporary consequences were probably anticipated when the constitution was formed. But it may be confidently expected that so just a rule will ultimately commend itself to all courts. It will be observed that the rule is one regulating the administration of a particular jurisdiction of the United States courts. It does not necessarily follow that this same rule should be applied in any other class of cases.

Since the rule must be attended with the qualification above named, the question next arises whether the doctrine which was laid down in the earlier decisions in Iowa gives a construction to the constitution of that State which is a rational, a permissible one. I have no doubt that it does. Indeed, it appears to me that the Supreme Court of the United States is right in saying that this view was the just and sound interpretation of that constitution. And it may now be added also that the Supreme Court of Iowa, within seven or eight years after the decision of the Supreme Court of the United States in the present case, came back again to the doctrine of the earlier cases, and that this doctrine is now the fixed law of the State.¹ It is enough, however, to say that the view was one which might reasonably be held.

It will be observed that the decision of this case does not at all turn upon the clause of the Constitution of the United States relating to impairing the obligation of contracts; and it should be added that it does not in any degree turn upon a theory that the

¹ Stewart v. Supervisors, 30 Iowa, 193.

United States courts have any special rights conferred upon them by the fact that the case relates to a contract. These courts are not the special protectors of contracts, excepting under the clause in the Constitution of the United States forbidding State *legislation* which implies their obligation. The ground of the present decision is that the courts of the United States are charged with a special duty, in litigation between citizens of different States; that the nature of this special duty requires these courts sometimes to exercise a perfectly independent judgment in construing and applying the laws and constitutions of the States; and that the rule of administration for the exercise of this function, laid down by the Supreme Court of the United States in *Gelpcke v. Dubuque*, is a just and wholesome one. The result is that the judgment of the District Court is reversed.

ON CERTAIN CASES ANALOGOUS TO TRADE-MARKS.

THE law of a class of cases analogous to trade-marks is still in the process of evolution, and it may be useful to consider the principles which should govern the decision of cases of this sort.

The symbolism of commerce, conventionally called "trade-mark," is, according to Mr. Browne, in his excellent work on trade-marks, as old as commerce itself. The Egyptians, the Chinese, the Babylonians, the Greeks, the Romans, all used various marks or signs to distinguish their goods and handiwork. The right to protection in such marks has come to be recognized throughout the civilized world. It is, however, during the last seventy or eighty years that the present system of jurisprudence has been built up. In 1742 Lord Hardwicke refused an injunction¹ to restrain the use of the Great Mogul stamp on cards. In 1783 Lord Mansfield² laid the foundation of the law of trade-marks as at present developed, and in 1816, in the case of *Day v. Day*, the defendant was enjoined from infringing the plaintiff's blacking label. From that time to the present day there have arisen a multitude of cases, and the theory of the law of trade-marks proper may be considered as pretty clearly expounded. In 1875 the Trade-marks Registration Act provided for the registration of trade-marks, and defined what could in future properly be a trade-mark. In this country the Act of 1870, corrected by the Act of 1881, provided for the registration of trade-marks.

The underlying principle of the law of trade-marks is that of preventing one man from acquiring the reputation of another by fraudulent means, and of preventing fraud upon the public; in other words, the application of the broad principles of equity.

"I think that the principle on which both the courts of law and of equity proceed, in granting relief and protection in cases of this sort," says Lord Langdale in *Perry v. Truefitt*, "is very well understood. A man is not to sell his own goods under the pretence that they are the goods of another man. He cannot be permitted

¹ *Blanchard v. Hill*, 2 Atk. 484.

² *Singleton v. Bolton*, 3 Doug. 293.

to practise such a deception, nor use the means which contribute to that end;"¹ and again in *Croft v. Day*, "You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufactures of such other person, while he is really selling his own. It is perfectly manifest that to do these things is a fraud, and a very gross fraud."² This broad equitable principle is, however, limited in its application by the nature of a trade-mark. A trade-mark has become an absolute right. It is a mark affixed to goods which pass from hand to hand, and is an exclusive right to that sign in connection with goods of a certain kind,—a right as against all the world. It is a right capable of registration, and its registration must be noticed under penalty of the law. It is a right for the infringement of which redress will be given, although the intention of the infringer is not fraudulent.³ A right so absolute could not be given without some qualifications, and we find that certain generic and geographical names are not such as may be exclusively appropriated by an individual; that words or signs which are not sufficiently distinctive, or are by their nature the property of the whole world, may not thus be appropriated. Indeed, the courts have laid down certain technical rules which must be observed to obtain a valid trade-mark.

In deciding whether there has been a breach of a trade-mark proper the courts are bound by these rules, and will grant no relief, whether they find fraud or not, unless there has been in use a trade-mark valid according to these rules, and unless there has been a technical breach. The only question is, whether the plaintiff has acquired an absolute right, and whether there has been an infringement of that right. What the rules of trade-marks are, what is a valid trade-mark, what is an infringement, are not within the scope of this article. What it is important to recognize is this: That the foundation of the law of trade-marks is natural

¹ 6 Beav. 66.

² 7 Beav. 84.

³ *Millington v. Fox*, 3 My. & Cr. 338; *Edelsten v. Edelsten*, 1 DeG., J. & S. 183; *Cartier v. Carlile*, 31 Beav. 292; *McLean v. Fleming*, 96 U. S. 245; *Upmann v. Forester*, 24 Ch. D. 231.

justice, or, as it is called, the principles of equity; that a trade-mark proper, being an exclusive right in an individual, the acquisition of this right had to be limited by certain rules; that this right, once acquired, becomes absolute, and that to constitute a breach of this right there must be a technical breach, independently of the question of the equity of the case, or rather independently of fraud, for there is no equity unless the technical trade-mark has been infringed.

Side by side with trade-marks has grown up another class of cases known as "cases analogous to trade-marks," — trade-names, trade-signs, the good-will of a business, etc., — as distinctive in their way as trade-marks, and as ancient. The Egyptians, the Greeks, the Romans, used striking sign-boards to distinguish their various trades. Addison devotes one number of the "*Spectator*"¹ to the various trade-symbols and trade-signs of the city of London. Tavern signs, such as the "White Horse," the "Blue Boar," the "Hand and the Bell," have long been in use. Cases analogous to trade-marks, however, differ from trade-marks in that they are not a mark stamped on goods which pass from hand to hand, and therefore are not technically trade-marks and do not fall within the rules of trade-marks. They differ from trade-marks in form, not in kind. Each owes its existence to the desire of the individual to stand out from the surrounding masses, and fairly, in the face of men, to get the full advantage to which his ability and industry entitle him.

In the class of cases known as "analogous to trade-marks," the right of a plaintiff is very different from what it is in cases of trade-marks proper. Here there is no question of a technical, well-defined right, an exclusive right; there is no certain mark or sign to which an individual is establishing a permanent claim; by the nature of the claim there is no possibility of registration. What each plaintiff asks is this: that he shall be protected against the fraud of a particular defendant. Fraud being an essential element in this view, the court must find a fraudulent intention from the peculiar circumstances of each case. As there is no question of granting an exclusive right, the court may apply to the facts of each case, without regard to the limitations by which it is bound in cases of technical trade-marks, the equitable principles which underlie the law of trade-marks. And the court may give

¹ No. 28, April 2, 1711.

the larger scope to its relief from the fact that each decision does not lay down a fixed rule applicable to all cases of this class, but only relieves against whatever fraud is working damage under the facts of each case.

The distinction between the law of trade-marks and of cases analogous to trade-marks, I understand to be this: In cases of trade-mark there is a definite exclusive right, which may be acquired according to definite rules, and which may be infringed in certain definite ways. The right is recognized as being exclusively the plaintiff's, and, indeed, it is by virtue of his exclusive right that he gets relief. Unless he has a trade-mark within these technical rules he has no exclusive right and can get no relief, and the court will be bound by technical rules in determining whether he has a trade-mark or not. In cases analogous to trade-marks, the right of the plaintiff is only against a particular defendant by reason of his fraud, and the court will apply the equitable principle of the prevention of fraud to the circumstances of each case.

The courts have recognized this distinction clearly. The reasoning of the English courts in the late cases on the subject leave no doubt of it.

In *Lee v. Haley*, L. R. 5 Ch. App. 155, the facts were as follows: The plaintiffs had carried on for some years at No. 22 Pall Mall, under the style of "The Guinea Coal Co.," a large business which had a considerable reputation. The defendant, who had been their manager, set up a rival business on the Strand under the name of "The Pall Mall Guinea Coal Co.," and soon removed to No. 46 Pall Mall. Many persons were misled into giving orders to the defendant, in the belief that his concern was that of the plaintiffs. The defendant set up in defence to a bill for an injunction by the plaintiffs that the plaintiffs habitually sold short weight, and that they had no exclusive right to the name "Guinea Coal Co.," which was used by various other establishments about London. The court held that if the plaintiffs had been systematically carrying on a fraudulent trade, and delivering short weight, it is beyond all question that it would not interfere to protect them in carrying on such trade. The court also held that, although the plaintiffs had no exclusive right to the name, an injunction to restrain the defendant from using the name "The Pall Mall Guinea Co.," *in Pall Mall*, was proper, on the ground

that the defendant had no right to use the name in such a way as to lead persons to believe that his business was that of the plaintiffs, and that therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used. In the words of Lord Justice Giffard, "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." I wish to call attention to what this decision means. It means the strict application of equitable principles to these facts. The defendant is enjoined only from using the name "Guinea Coal Co.," in Pall Mall, in the street where it is likely to cause confusion, the relief the court thought necessary under these circumstances to prevent fraud. And this relief was made dependent, as, indeed, it is in every case of trade-mark,¹ on the plaintiffs coming into court with clean hands, — a principle familiar to all proceedings in equity.

In Wotherspoon *v.* Currie, L. R. 5 H. L. 508, the facts are these: the plaintiffs had for some years manufactured starch at Glenfield, and their starch had become known as "Glenfield Starch." Their business increasing, they removed from Glenfield, although they continued to call their starch by the same name. The defendant established himself at Glenfield, and began to manufacture starch under the name of "Glenfield Starch." It was argued for the defendant that there could be nothing wrong in his using the name of the place where the starch was actually made, and that there was no misrepresentation or fraud; but the court thought otherwise, and an injunction issued to restrain the defendant from using the word "Glenfield" in or upon any labels affixed to packets of starch manufactured by him, and from in any other way representing the starch manufactured by him to be "Glenfield" starch, and from selling or causing the same to be

¹ Hobbs *v.* Français, 19 How. Pr. 567; Fetridge *v.* Wells, 13 How. Pr. 385; Partridge *v.* Menck, 1 How. App. Cas. 558.

sold as "Glenfield" starch, and from doing any act or thing to induce the belief that starch manufactured by him is "Glenfield" starch, or starch manufactured by the plaintiffs. Here is granted equitable relief of a kind impossible under the technical law of trade-marks.

The late case of *Thompson v. Montgomery*, 41 Ch. D. 35, is an important one as expressing clearly the difference of right in trade-marks and in cases analogous to them. There the plaintiffs had for years carried on a brewery at Stone, and their ale had come to be known as "Stone Ale." They had registered these words as a trade-mark. The defendant built a brewery at Stone, and attempted to call his ale "Stone Ale." The court held that the words "Stone Ale" were not such as might be used as a trade-mark, and ordered them to be struck out of the register. But as to the right, apart from the technical trade-mark, Lord Justice Lindley says: "The plaintiffs' rights are to prevent anybody from passing off his goods as the goods of the plaintiffs. Sir Horace Davey says that the plaintiffs have no exclusive right to the use of the words 'Stone Ale' alone. Perhaps not as against the world. He says that the plaintiffs have not any right to prevent the defendant selling his goods as having been made at Stone; I am not prepared to say that they have. But as against a particular defendant, who is fraudulently using, or going to fraudulently use, the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders." And an injunction issued.

In no one of these cases is there a breach of what might be a technical trade-mark. "Guinea Coal Co.," "Glenfield Starch," "Stone Ale," according to the law of trade-marks proper, were unfit names to be used as trade-marks. Yet the court in each case went far beyond the analogy of trade-marks, and, applying the underlying equitable principle as laid down by Lord Langdale in *Perry v. Truefitt*, that it is a fraud for a man to sell his goods under the pretence that they are the goods of another man, gave such relief against that particular fraud as the circumstances of the case demanded. The principle on which the courts went is unmistakable. They admit no exclusive right in the plaintiffs, but "it is a fraud on a person who had established a trade, and carried it on under a given name, that some other person should

assume the same name . . . in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." The key-note is fraud; fraud on the public and fraud on the individual injured in his business.

In this country the great distinctive principle has not been enunciated with as great clearness as in England, but I think the decisions show a recognition of it.

In *Colton v. Thomas*, 2 Brews. 308, the plaintiff practised as a dentist under the name of the Colton Dental Association. The defendant, who had been in his employ, left him and put up a sign reading, "Dr. F. R. Thomas, late operator at the Colton Dental Rooms," the words "late operator at the" being in very small letters. Injunction granted to restrain the defendant from using such signs and cards, and from representing his place of business to be the plaintiff's. The case of *Saunders v. Jacobs*, 20 Mo. App. 96, is similar; the name "Newark Dental Rooms" was enjoined as being too much like "New York Dental Rooms." The "What Cheer House" was held to be a name which a rival hotel-keeper could not use (*Woodward v. Lazar*, 21 Cal. 448). In *Howard v. Henriques*, 3 Sandf. 725, the proprietor of the "Irving House" was allowed to restrain the defendant from opening a hotel under the same name. The court, by Mr. Justice Campbell, said: "We are not disposed to interfere with the lawful pursuits of any one. Every man may and ought to be permitted to pursue a lawful calling in his own way, provided he does not encroach upon the rights of his neighbor or upon the public good. But he must not by any deceitful or other practice impose upon the public; and he must not, by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality, and thus despoil him of the gains to which by his industry and skill he is fairly entitled." Mr. Browne, in commenting on this case, § 96, says that the name of a hotel cannot be twisted into a trade-mark. "Then, if not a case of trade-mark, what was it? It was exactly what the Superior Court called it: the 'good-will' of the establishment. The case did not call for a definition. All that was required was substantial justice, upon the allegation of the invasion of an equitable right." In *Walker v. Alley*, a Canadian case reported in 13 Grant Up. Can. Ch. 366, the plaintiff had established a dry-

goods house under the sign and name of the "Golden Lion." The defendant attempted to begin a similar business under the same name and sign. An injunction issued. *Per curiam*: "You have your choice of many signs which, as a mere attraction, or to give your store a marked designation, must answer a fair business purpose equally well."

A late case in the Circuit Court of Pennsylvania¹ seems to recognize the English doctrine that the fraud and not the analogy of a technical trade-mark is the important point. A bill alleged that the plaintiff alone possessed the right to bronze horseshoe nails as a trade-mark, and to sell the same under the trade-name; that the defendants sold bronze nails similar in appearance to those manufactured by the plaintiff; and that purchasers have been and are deceived into buying the articles so bronzed and sold by the defendants in the belief that they are of the manufacture of the plaintiff. The defendants demurred. Mr. Justice Bradley overruled the demurrer and gave the defendants time to answer. "Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainants which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainants. This is fraud. . . . The allegation that the complainants' peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge which we think the defendants should be required to answer."

The French courts have gone very far towards preserving commercial rights and applying equitable principles to commercial competition. There all "concurrence déloyale," all manœuvres that cause prejudice to the name of a property, to the renown of a merchandise, or in lessening the custom due to rivals in business, is restrained and punished.² Mr. Browne translates "concurrence déloyale" by "unfair competition in business" (§ 43). Mr. Browne, in his chapter on Rights Analogous to Trade-marks, has collected a number of the French cases, and I shall cite some of them to illustrate how far the courts have gone in applying the principles which, it seems to me, ought to govern cases of this class.

The plaintiffs were proprietors of a hat-shop founded twenty-

¹ Putnam Nail Co. v. Bennett *et al.*, 43 Fed. Rep. 800.

² See *c. Duringer*, 18 Annales, 148.

five years before as "*Maison Pinaud*," and established at 87 Rue Richelieu, Paris. The defendant, whose name was differently spelled but was pronounced the same, removed to 91 Rue Richelieu and established another hat-shop, under the name of "*Maison Pineau*." The court held that the defendant acted with the intention of profiting by the similarity of names, and to divert to himself the custom of the old house of Pinaud; that although he had an incontestable right to establish himself under his true name, yet he must be interdicted from unlawful competition, and measures must be taken to prevent confusion in the mind of the public between the two houses. *Pinaud & Amour c. Pineau*, 4 Annales, 86; the case of *Bonnet et al. c. Henri Delisle*, 4 Annales, 301, illustrates the same principle. In the case of *Dorvault c. Hureaux*, 4 Annales, 125, the plaintiffs had for about twenty-five years used as a sign and upon their labels and circulars the words "Pharmacie Centrale de France." The defendants had as their sign the words "Pharmacie Rationnelle," but added "Centrale de France." This fact was recognized by the court as an attempt to create confusion between the two establishments, and the defendants were prohibited from the further use of the latter-mentioned words. In *Muller c. Compagnie Immobilière*,¹ the plaintiff had for more than fifteen years carried on the "Hôtel de la Paix." The defendants built a hotel on the same street and gave it the same name. The court held that the words "Hôtel de la Paix" were indicative and characteristic of the hotel owned by Muller, and that those words could not be used by others in the same business without violating his rights.

The cases of the "Banque du Commerce et de l'Industrie c. Banque Centrale du Commerce et de l'Industrie,"² of "Banque Populaire c. Banque Populaire d'Escompte,"³ of the signs "Entrepôt d'Ivry" and "Chautier du Grand Ivry,"⁴ of "Chauchard & Compagnie c. Dreux-Bussienne,"⁵ of "Samie c. Compagnie des Eaux Thermale de Royat,"⁶ of "Moët c. Moët et Chandon,"⁷ show how careful the French courts are to prevent confusion in the minds of the public, insisting that each trader should stand

¹ 8 Annales, 265.

² 29 Annales, 231.

³ Ibid. 234.

⁴ Bulletin Officiel, 222.

⁵ Dulloz Jurisprudence Générale, 1884. Cours d'Appel, p. 84.

⁶ Dulloz Jurisprudence Générale, 1884. Cours d'Appel, p. 226.

⁷ Ibid. 1887. Cours d'Appel, p. 220.

on his own merits. In *V^e Edrard c. Nicolas Edrard, Dulloz*, 1879, *Cours d'Appel*, p. 100, both the plaintiff and the defendant were manufacturers of pianos. The defendant placed his own name on his pianos, so that they were mistaken for those of the plaintiff. The court held that every man has a right to use his own name in his business, although he must not use it so as to usurp, by a fraudulent confusion, the advantages of the credit and reputation of another already established under that name, and the courts have the right to prescribe the measures necessary to avoid the fraudulent confusion which would result in such use. Here the court prescribed on what parts of the pianos the names (Christian as well as surname) of the defendant should appear, the size of the letters, and ordered that the name of his residence, "Mulhouse," should be used in connection with his own name, so as to distinguish him from the plaintiff.

In *Chaize c. Fromentelle*¹ the parties were tobacconists in the same neighborhood. The plaintiff's sign read, "La Civette." The defendant's read, "A la Nouvelle Civette." Both in this case and in a similar one where the sign was "A la Civette de la Rue de Rivoli," the plaintiff had judgment for the removal of the objectionable sign. In *Lebat v. Partongue*, 1 Blanc, 709, the Imperial Court of Paris held that the color of a sign and its general aspect are considered as sufficiently distinctive to be respected.

These French cases are indexed under the titles of "Concurrence Déloyale" and "Propriété Industrielle," a fact interesting as indicative of the principles on which the courts go. After having looked over a large number of cases in the original reports, a fair statement of these principles seems to me to be this: That a man shall not be restrained from using any words or signs to which he has a right, unless he uses such words or signs in unfair competition with one who has a prior right to the same or similar words or signs; that all competition which the court sees to be unfair and likely to cause confusion in the mind of the public and injury to the lawfully established trade of the plaintiff shall be restrained, and that the court will order such changes in the objectionable features of the competition as will put an end to the fraud.

The present article was suggested by two cases which have come up lately in this State before single justices on bills for an injunc-

¹ *xx Annales*, 350.

tion. In the first case, the American Waltham Watch Company asked for an injunction against the use of the words "Waltham Watch" by the United States Watch Company. Both corporations are established at Waltham,—the defendant recently, the plaintiff for many years. The watches of the plaintiff have a world-wide reputation under the name of "Waltham" watches. The evidence proved to the satisfaction of the court that the defendants were trying unfairly to obtain the benefit of the plaintiff's reputation. Mr. Justice Holmes granted an injunction against the use of the words "Waltham Watch" or "Waltham Watches," alone or in combination.

In the second case, the plaintiff had established some fifty years ago a clothing-store on Dock square, in Boston, which he has always painted a vivid blue, and which he called, and still calls, "The Blue Store Clothing House." Owing to large expenditures in advertising, the plaintiff's store has become widely known under this name, and acquired a reputation for excellence. Within a few weeks the plaintiff gave up a shop adjoining his own building which he had used for several years in connection with his business, and which had been painted the same color as his main building. Before leaving, the plaintiff was careful to paint this shop brown. The defendants leased this shop immediately on the expiration of the plaintiff's lease, painted it the same blue as the plaintiff's,—an expensive and unusual color,—and advertised in various ways as the "Blue Store Clothing House." The evidence disclosed to the satisfaction of the court a scheme to obtain the benefit of the plaintiff's laboriously earned reputation, and Mr. Justice Charles Allen granted an injunction, but only against the use of the words "Blue Store" alone or in combination.

The question in all these cases seems now to be how far the court will go. Is the court bound by the analogy of trade-marks proper? Will the court refuse an injunction because the words or signs are such that they would not be a valid trade-mark? Will the court hesitate because the word or sign is of such a description that no one can have an exclusive right to it? The cases I have cited seem to me to answer these questions decisively. The principle is the prevention of fraud in each specific case, whether its manifestation be by color, or word, or sign, or mark. The court, finding that in a certain case the fraud which is likely to deceive and does deceive the public and induce them to buy the goods of

the defendant under the belief that they are the goods of the plaintiff is of a certain kind, may go to any length it deems just to suppress the fraud. Once let it be recognized that cases of trade-mark and cases analogous to trade-mark differ radically, in that the one gives an exclusive right and the other abates a particular fraud, and there is no longer any difficulty in working out what must seem clearly to every honest man to be substantial justice. And the only logical consequence of the decisions in this class of cases is the application of the principles of equity in each individual case.

To recapitulate in a few words what I believe to be of the law of trade-mark as distinguished from the principle which already is, or is to become, the law of cases analogous to trade-marks: A trade-mark is a definite and technical sign which is capable of registration as the exclusive right of an individual, and there will be no relief, whether there is fraud or not, unless there is a technical breach of that mark. In cases analogous to trade-marks fraud is the gist of the action, and where fraud is found the court is able to give equitable relief, whether there is a breach of a technical right or not; and the relief may extend to whatever acts cause the damage complained of, whether or not the acts would be a breach of the plaintiff's right in the case of a trade-mark proper.

The decision of the courts, in cases of this sort, have a far-reaching effect on commercial morality. It is not simply a question of expediency which they are called upon to try, but how best to mould the opinion of the community that right may prevail rather than wrong. Whether trade rivalry shall be open and fair, so that each may be stimulated to his best endeavor in the knowledge that his exertions will bring him in to the full the honor and profit which are his due, or whether fraud, which knows how to evade definite rules, shall reap the fruits of honest labor and hardly-won reputation, is within the discretion of the court. In France commercial morality is high, and the rules as to unfair rivalry in trade are strict. In this country our commercial honesty is proverbially low, and it remains to be seen whether our courts will check the tendency of our business relations towards a lower standard.

Grafton Dulany Cushing.

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BANKRUPTCY OF PARTNERS.—Mr. A. Turnour Murray, in an article in the current number of "The Law Quarterly Review,"¹ suggests a new rule for the distribution in bankruptcy of the joint and separate estates of partners. His principal objections to the English rule are that "it is artificial, being founded on no intelligible principle, and is inconsistent with the principles of the law of partnership," and that "it is unfair in practice to the partnership creditors in cases where the partnership property is small and disproportionate with the separate estates." The Scotch rule, on the other hand, which applies the separate estates "to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy," Mr. Murray finds open to the opposite objection, viz., that "in practice it produces great hardship to the separate creditors;" and further, that it is based upon the principle that the firm is a distinct person, which is inconsistent with the English conception of partnership. His own rule is a mean between these two, and is said not only to be consistent with English law, but also to give the "fairest" practical results.

As for principle, his rule is based upon the theory that as far as debts are concerned partnership property is a fund set aside as a provision against loss, and that while a partnership creditor is a creditor of each of the partners, any partner who pays out of his own pocket a partnership debt is entitled to indemnity from the common fund. In bankruptcy, therefore, let the partnership creditors in the first instance come against each separate estate *pari passu* with the separate creditors. Then let the separate creditors look to the joint estate for indemnity.

Exactly stated, the rule is as follows:—

"Apply each separate estate in payment of its separate debts *pari passu* with partnership debts;

"Apply the partnership property in paying separate creditors their unpaid debts to an amount not exceeding the amount contributed to partnership debts by each respective separate estate;

"And subject thereto in paying partnership creditors their unpaid debts."

¹ Bankruptcy of Partners, 7 Law Quar. Rev. 53.

It will be seen that where the separate estates are large, and the joint estate next to nothing, the joint creditors, who would get nothing under the English rule, would receive under this rule substantial dividends. In this case the result is the same as under the Scotch rule, whereas if the partnership property is equal to the amount taken out of the separate estates for the partnership creditors, the result under Mr. Murray's rule is the same as under the English rule, thus avoiding the "injustice" to the separate creditors brought about by the Scotch rule. The suggested rule is indeed a mean between the other two. For a full and clear explanation of the operation of the three rules under different circumstances, the reader is referred to the specific examples in figures given by Mr. Murray.

What we are here concerned with, however, is the principle on which Mr. Murray's rule is based. Is it true that he has reached the bottom of the theory of partnership, when he says that the function of the joint property is to indemnify the partner who has paid a partnership debt? Or is he giving universal application to a subsidiary rule which in truth has but a restricted scope?

Let us first test his conclusions by his own hypotheses, which are as follows:

- "(1.) A partnership creditor is a creditor of each of the partners.
- "(2.) Partnership property is primarily applicable in payment of partnership debts.
- "(3.) A partner who has paid a partnership debt is entitled to be indemnified out of the partnership property."

By (1) he allows the joint creditors to prove at once against the separate estates and receive dividends. Then by (3) the separate estates reimburse themselves from the joint estate. But the amount thus put into the separate estates is divided solely among the separate creditors. Ought it not rather to be open to the claims of the joint creditors as well? For it has now become separate estate, and by (1) all separate estate is liable for partnership debts.

This objection assumes that the separate estates are justified in taking the amount in question and denies the right to apply it solely to the separate debts. The more fundamental question is, Are the separate estates in a position to take the indemnity at all? For, assuming that they do take it, what has become of hypothesis number (2)? If "partnership property is *primarily* applicable in payment of partnership debts," how can it be taken to indemnify a partner's separate estate when the result of such taking is to leave partnership debts unpaid?¹ If the word *primarily* has any meaning, the rest of the partnership debts should be paid before the partner's claim to indemnify is thought of. Look at the absurdity of the result at this second stage of Mr. Murray's rule. There are partnership debts still unpaid; by (1) the partner's separate estate is liable for them; by (2) the partnership property is *primarily* liable for them; but both these liabilities are avoided, for by (3) the partnership property is converted into separate property and then for some unknown reason is no longer liable for partnership debts. Two funds are confessedly liable for the same debts; add the whole of one fund to the other and the

¹ We are of course discussing the case where the dividends received by the partnership creditors do not amount to payment of their debts in full.

liability disappears. Add two plus quantities together and obtain a minus quantity!

In other words, hypothesis number (3) is, as Mr. Murray applies it in the case of bankruptcy, absolutely inconsistent with numbers (1) and (2). The logical result of numbers (1) and (2) would seem to be the Scotch rule. Moreover, in obtaining this result we make no assumption that the partnership is a "distinct person." For we do not say that the firm is the debtor. We adhere to Mr. Murray's statement that the individual partners are the debtors, and we merely insist on adhering also to his second statement, namely, that certain property of these debtors is *primarily* applicable to certain debts of theirs. In short, the conception seems to be exactly analogous to the case of a creditor who has specific property of his debtor's as security; and here it is undoubted law that in bankruptcy the creditor may exhaust the whole of his security and come upon the rest of his debtor's property, *pari passu* with the other creditors, for the amount of his debt which remains unpaid. If partnership property, therefore, is primarily applicable, apply it as far as it will go, and come on the separate estate for the rest. If the estates are applied in the order indicated, the conditions of number (3) cannot arise; and, even though they are applied in the reverse order, number (3) can have no place, unless the debts have been paid in full or the partnership property is more than sufficient to pay what is left of them. If, however, the debts have been paid in full, it follows, as a matter of course, from the fact that partnership property is *primarily* liable, that whatever is left of the partnership property must go to replace that part of the separate property which was taken to pay the debts in question.

In short, number (3), in so far as it is valid as a necessary deduction from numbers (1) and (2), gives no support whatever to Mr. Murray's rule; while, as applied in Mr. Murray's rule, it is inconsistent with numbers (1) and (2).

Having apparently arrived at the Scotch rule, let us consider Mr. Murray's objections to it. He says that it unduly favors partnership creditors and produces great hardship to the separate creditors. We admit that in many cases the result of the Scotch rule is that partnership creditors receive large dividends, while separate creditors receive exceedingly small ones. But what more natural than that A, who confessedly has a claim against two funds, should be in a better position than B, who has a claim on but one of them? It is of course just that A should be compelled to exhaust his own fund before competing with B; but beyond this A's claim against the separate estate is as good as B's, and we fail to see any "unfairness" in letting him enforce it on equal terms with B. The English rule seems to be founded on a misunderstanding of this principle of marshallung. A, though only partially satisfied out of the partnership property, is deprived altogether of his right against the separate property, until B is wholly satisfied. The injustice of such a rule is apparent, and is it not also apparent that anything short of the Scotch rule is equally indefensible?

Mr. Murray, however, urges, as a further objection to the Scotch rule, that it necessitates the assumption that a partnership is a "distinct person," and that this theory is irreconcilable with English law. Of course the Scotch rule is one of the necessary consequences of the assumption alluded to; but, if our deductions have been correct, it is also a necessary conse-

quence of Mr. Murray's own hypotheses, which he states as "three leading principles in the English law of partnership." This last objection, therefore, falls to the ground.

In the foregoing discussion, we have assumed the correctness of Mr. Murray's hypotheses as the most conclusive way of showing the incorrectness of his rule. The hypotheses themselves, however, we are by no means disposed to admit. The "mercantile theory," so far from being "clearly opposed to the principles of the English law of partnership," is the real basis of many of the English decisions; and, though by no means openly recognized or universally applied, it is, we venture to think, the only theory on which it is possible to work out completely and satisfactorily the law of partnership.

This general theory we have not the space to discuss; suffice it, therefore, to point out its application to the case in hand. A partnership creditor, instead of being as in number (1) above the creditor of each of the partners, is the creditor of the firm, and has no direct claim of any kind upon the separate estates of the partners. The partners, however, are liable to the firm for any deficiencies in the firm assets. This contingent liability of the partners to the firm is in fact one of the assets of the firm. The other assets of the firm are of course first applied to the firm debts. Then, in regard to the amount of firm debts which remain unsatisfied, the firm creditors must work out their rights, not directly against the separate estates of the partners, but through their debtor, the firm. For the amount of this deficiency, the firm is the creditor of each of the individual partners, and is entitled to prove against the separate estates on an equal footing with other separate creditors.

This is in substance the view put forth by Mr. Cory in his *Treatise on Mercantile Accounts*.¹ Mr. Murray sees fit to characterize it as "the operation of an accountant who is ignorant of the principles which govern the law of partnership," and as a system which "entirely breaks down and produces unjust results when the partners are insolvent." We have tried to show, however, in regard to this last point, not only that this system produces just results, but, further, that Mr. Murray's own principles, when properly applied, produce exactly similar results.

F. C. H.

MAYOR MATTHEWS, of Boston, makes the interesting recommendation in his inaugural address that the whole expense of laying out new streets be charged in future upon the abutting owners. He suggests various arguments to show the expediency of this plan; but its constitutionality seems open to grave doubt. Can it be said to be a "proportional and reasonable" tax within the Constitution of Massachusetts to lay the whole burden upon the abutters without any regard to the benefit conferred upon the public at large? In *Dorgan v. Boston*, 12 All. 223, where the constitutionality of local assessments for improvements was upheld, the court observed that it would be plainly unconstitutional to designate a certain class of persons on whom to impose a tax, "having no regard to the share of public charges which each ought to pay relatively to that borne by all others." In *State v. Newark*, 37 N. J. Law, 415, a statute

¹ See the passage cited by Lord Justice Lindley in his *Treatise on Partnership* (1888), p. 696.

requiring abutters to pay two-thirds of the cost of paving a street was held unconstitutional, though it left the other third to come from the public, as disregarding the principle that local assessments must be based solely on benefit to the person assessed.¹ And in Pennsylvania also, though the Constitution contained no express restraint on the taxing power, a similar statute was held unconstitutional in *Hammett v. Philadelphia*, 65 Pa. 146, on the ground that it was inconsistent with the idea of equality necessarily involved in the conception of a tax. The reasoning of these cases would seem to apply *a fortiori* to Mayor Matthews's project.

CAN a State forbid aliens to sell liquor? The Court of Appeals of Maryland has held in *Trageser v. Gray*, 20 Atl. Rep. 905, that it can; but the decision can be supported only by putting the liquor traffic on peculiar ground. It would scarcely be asserted that a State could, under the Fourteenth Amendment, enact that no alien should carry on the trade of a butcher or baker; and *Yick Wo v. Hopkins*, 118 U. S. 356,² shows plainly enough that a similar restriction on the laundry business is unconstitutional. Why, then, is it valid in the liquor trade? The reasoning in *Trageser v. Gray* is something as follows: A State can prohibit the sale of liquor altogether, and therefore no man, alien or citizen, has a "natural right" to sell it. This right to prohibit necessarily includes the right to regulate; and into the reasonableness of the regulation the court cannot inquire. The Fourteenth Amendment does not compel an "equal distribution of favors," because that amendment imposed no restraints on the police power of the States. "We are unable," says the court, "to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit, or diminish the police power of a State. Such power is original, inherent, and exclusive. It has never been surrendered to the general government, and never can be surrendered, without imperilling the existence of civil society."

This treatment of the police power indicates the fallacy which, it is respectfully submitted, underlies the decision in *Trageser v. Gray*. The court says that no one can acquire rights which in any way limit the police power of a State; yet by the Thirteenth Amendment several million slaves acquired rights destructive of the institution which was a generation ago the typical illustration of the police power. And so the Fourteenth Amendment, though of course leaving with the States the power to regulate their internal affairs, and so the great mass of legislative powers included in the term "police power," provided that in the exercise of this or any other power no person should be deprived of the equal protection of the laws. The Legislature may prohibit the liquor trade, *i. e.*, make a lawful trade unlawful; otherwise it remains lawful, subject, like other lawful trades, to regulation by the State. But whatever else the State may accomplish by this regulation, it must stop short of withholding the equal protection of the laws; and when the fact that a man is an alien is made a ground for excluding him from a trade open to others, this clause of the Fourteenth Amendment seems to apply with the same force

¹ The court added that it would be otherwise in the case of a sidewalk, where the abutter could probably be charged with the sole expense of maintaining it; but the reason for this was distinctly stated to be the difference between the sidewalk and the rest of the street.

² See 4 Harv. L. Rev. 236.

whatever be the nature of the trade. It is not that an alien has an inherent right to sell liquor, but that he has a right not to be debarred merely because he is an alien. Would the Maryland Court of Appeals, in view of the history of the Fourteenth Amendment, support a statute forbidding any negro to sell liquor?

In *Trageser v. Gray* the provision in question was only one clause of a statute raising the license fee and imposing on the liquor trade other restrictions not unlike those in *Crowley v. Christensen*, 11 Sup. Ct. Rep. 13,¹ and plainly constitutional. As the plaintiff undertook to treat the whole statute as invalid, and demanded a license under the provisions of the statute previously in force, the *decision* of the case may be supported consistently with the views here suggested; and it is noticeable that two members of the court, including the Chief Justice, while concurring in the judgment, state that their reasons are not those of the majority. If the Supreme Court of the United States has occasion to pass upon the constitutionality of the alien clause, it may be seriously doubted whether the decision of the Maryland court will be sustained.

THE Incorporated Council of Law Reporting for England and Wales has decided to begin a new series of reports. The change is entirely unnecessary and has caused a good deal of grumbling in England, as the advantages of it are not very apparent and it necessitates a new method of citation. It was hard enough before to avoid confusing 1 Q. B., L. R. 1 Q. B., and 1 Q. B. D., but we must now add [1891] 1 Q. B. The citations for the new series will be as follows:

Chancery Division	[1891] 1 Ch.
	[1891] 2 Ch.
	[1891] 3 Ch.
Queen's Bench Division	[1891] 1 Q. B.
	[1891] 2 Q. B.
Probate Division	[1891] P.
Appeal Cases	[1891] A. C.
In 1892 they will be	[1892] 1 Ch., etc.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — JOINT TORT-FEASORS. — Where vessel A. has been injured by the negligent management of vessels B. and C., the admiralty rule as to damages is the same as the common-law rule; the entire damage may be recovered from either one, if the plaintiff chooses. The American rule, that in the first instance only half can be recovered from either one, and, in addition, the balance only, which the plaintiff cannot enforce against either, being recoverable from the other, does not hold in England. *The Avon* [1891], P. 7 (Eng.).

ADMIRALTY — MARITIME LIEN. — The plaintiff agreed to remain on board ship while it was at the dock. Held, he had a maritime lien for wages so earned. *Reg. v. Judge of City of London Court*, 63 L. T. Rep. n. s. 492 (Eng.).

¹ See 4 Harv. L. Rev. 236.

BAILMENT — NEGLIGENCE OF BAILEE. — The plaintiff, while trying on a cloak in the store of the defendant, a dealer in ready-made clothes, laid her own cloak aside, and when she looked for it again, it was gone. *Held*, that the defendant, by providing mirrors and clerks to aid in the process of trying on garments, impliedly invited customers to lay aside their wraps during the process, and was, therefore, bound to exercise some care over them; and as in this case, by his failure to provide a place to keep the wraps, and to notify either the customer or his clerks to look after them, it was evident that he exercised no care at all, he was liable. *Bunnell v. Stern*, 25 N. E. Rep. 910 (N. Y.).

COMMON CARRIERS — EMINENT DOMAIN. — *Held*, that the statute providing that a corporation organized for the construction of "any railway" may appropriate land for a right of way does not apply to a corporation organized to construct a street railway propelled by electricity or horse-power for local convenience and the transportation of passengers so as to authorize it to condemn private property for a right of way. *Thomson-Houston Electric Co. v. Simon*, 25 Pac. Rep. 147 (Or.).

COMMON CARRIERS — LIABILITY OF MASTER FOR TORTS OF SERVANT. — The plaintiff was a passenger in defendant company's train. Induced by the conductor joining with others in simulated threats to rob, bind, and throw him from the train, he jumped off and was injured. *Held*, that the company were liable for the misconduct of the conductor, and the plaintiff could recover. *Spohn v. Missouri Pac. Ry. Co.*, 14 S. W. Rep. 880 (Mo.).

CONSTITUTIONAL LAW — EQUAL PROTECTION OF LAWS — REGULATION OF SALE OF INTOXICATING LIQUORS. — Act Md. 1890, c. 343, established a Board of Commissioners to regulate the sale of intoxicating liquors in the city of Baltimore, and empowered the Board to grant licenses only to citizens of the United States. *Held*, that the act was a valid exercise of the police power and not in conflict with U. S. Const., 14th Amend., § 1. *Trageser v. Gray*, 20 Atl. Rep. 905 (Md.).

CONSTITUTIONAL LAW — "HOLDING COURT." — The constitution of Montana provides that "the State shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the District Court. . . . Any judge of the District Court may hold court for any other district judge, and shall do so when required by law." *Held*, that this section does not of itself confer upon a judge who is holding court in a district other than his own, authority to grant an injunction in chambers. DeWitt, J., dissenting. *Wallace v. Helena El. Ry. Co.*, 25 Pac. Rep. 278 (Mon.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — INTOXICATING LIQUORS. — The Supreme Court of the United States decided in the case of the Iowa liquor law that it was broad enough in its terms to embrace all liquors and all sales of liquors by every person, but that this law, under the Constitution of the United States, was inoperative on liquor imported into the State as long as it remained in the original packages, and could not be applied to the sale of liquor in the original package by the importer, "in the absence of congressional permission to do so." The court did not declare the statute of Iowa void, but that its extension or application to liquor in the original packages in which it was imported was, in the absence of congressional consent, unconstitutional. *Held*, that the act of Congress, Aug. 8, 1890, which gives such consent is constitutional, and that its effect is to extend previously existing State liquor laws to liquor imported into the State. *In re Van Vliet*, 43 Fed. Rep. 761.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — ORIGINAL PACKAGES. — Where several bottles of liquor, each bottle separately wrapped in paper, labelled "Original Package," and marked with the name of the importer, are placed in an open box and shipped therein into another State, the box is the original package.

But where the boxes are furnished by the carrier, and fastened to the car so as virtually to become a part thereof, the bottles separately wrapped and directed are the original packages. *Keith v. State*; *Rion v. State*, 8 So. Rep. 353 (Ala.).

In *State v. Chapman*, 47 N. W. Rep. 411 (S. D.), bottles were each sealed up in paper wrappers and packed in open boxes, and it was held that the boxes were the original packages. See note, 4 Harv. L. Rev. 284.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TELEPHONE MESSAGES. — A message sent by telephone from one State to another is interstate commerce, and a tax imposed by a State upon corporations engaged in transmitting such messages

cannot be enforced by injunction, although the tax may be legal. *In re Pennsylvania Td. Co.*, 20 Atl. Rep. 846 (N. J.).

CONTRACTS — ADVANCE FREIGHT. — A cargo was shipped under a charter-party, providing that one-third freight should be advanced if required, less three per cent., etc. *Held*, the requirement could be made after the cargo, to the knowledge of all parties, was lost. This follows necessarily from the fact that advance freight cannot be recovered, and an unconditional agreement to pay it can be enforced, after loss of cargo. *Smith, Hill, & Co. v. Pyman Bell & Co.*, [1891] 1 Q. B. 42 (Eng.).

CONTRACTS — ILLEGALITY — PUBLIC POLICY. — An assignment by a sheriff of fees yet to be earned will give the assignee no right to the fees as against the judgment creditors of the sheriff. It is against public policy, and void. *Bowery Nat. Bank v. Wilson*, 25 N. E. Rep. 855 (N. Y.).

EQUITY JURISDICTION — FIDUCIARY RELATION — FACTOR AND PRINCIPAL. — A factor whose account was largely overdrawn deposited in a bank money which was the proceeds of property consigned to him for sale. *Held*, the money was in law due to the factor, but he holds such a fiduciary capacity that the principal has an equitable claim upon it. Therefore, if the bank received the money knowing of the claim of the principal, it could not retain it to set off against over-drafts by the factor on his own account, but is liable to the principal for the whole amount on a bill in equity. *Union Stock Nat. Bank v. Gillespie*, 11 Sup. Ct. Rep. 118.

EQUITY JURISDICTION — RIGHT TO MEMBERSHIP IN A POLITICAL ORGANIZATION. — The courts will not attempt to enforce the right of a person, duly elected thereto, to sit as a new member of a Democratic County Committee, a voluntary unincorporated political association, whether it has a fund in its possession or not. It is quite unlike the case of one who has become a member of a social club for purposes of pleasure or profit, and has, thereby, become entitled to participate in the advantages of membership. Membership in a political organization can have no conceivable pecuniary value, for the court must assume that the objects of the association are merely to strengthen the party. *McKane v. Committee*, 25 N. E. Rep. 1057 (N. Y.).

HUSBAND AND WIFE — DIVORCE — ESTOPPEL. — Where a wife abandons her husband to live in adultery with another man, whom she marries after learning that her husband has procured a divorce, then, although after her first husband's death the decree is, at her instance, adjudged void for want of jurisdiction, she is estopped, by her having accepted the benefits of such decree of divorce, from claiming any share in her first husband's estate as his widow. *Arthur v. Israel*, 25 Pac. Rep. 81 (Col.).

LIBEL — PRIVILEGED COMMUNICATION. — A bank sued its cashier on his bond for misappropriating its funds, and served a bill of particulars of the defalcation on the defendant's attorney in that action, which stated that the funds had been misappropriated "by collusion with the teller." It also gave a similar statement to a representative of the sureties, at his request, but there was no other publication. *Held*, that although the statement in regard to the teller was made in the course of a judicial proceeding and in good faith, yet, as it did not tend to establish any fact relevant to the defendant's case, it was *prima facie* a libel. O'Brien and Earl, JJ., dissented. *Moore v. Manufacturers' Bank*, 25 N. E. Rep. 1048 (N. Y.).

MALICIOUS PROSECUTION — PROBABLE CAUSE. — The conviction of the defendant in a justice's court is conclusive evidence of probable cause, though followed by an acquittal on appeal. *Adams v. Bicknell*, 25 N. E. Rep. 804 (Ind.).

MASTER AND SERVANT. — Where a boy of thirteen years is employed in a tinshop, and is allowed by his master to work a cutting-machine, making trinkets for his own amusement, and is injured while so doing, whether the boy had capacity to appreciate the danger is a question of fact for the jury in determining whether the master was negligent in allowing him to use the machine. *Wynne v. Conklin*, 12 S. E. Rep. 183 (Ga.).

NEGLIGENCE — ABSTRACT OF TITLE CO. — LIABILITY. — An abstract company which prepares an abstract on the order of a vendor, delivers it to him, and warrants it to be a true and perfect abstract of the title, is liable for omissions to a vendee who completes his purchase in reliance on it. The company holds itself out as competent to do the work, and assumes the responsibility of discharging its duties in a skilful and careful manner. *Dickel v. Nashville Abstract Co.*, 14 S. W. Rep. 896 (Tenn.).

NEGLIGENCE — DEFECTIVE HIGHWAYS — LIABILITY OF ABUTTERS. — A city charter provided that it should be the duty of lot-owners to keep the sidewalks adjoining their lots in repair. It also provided that in case of a failure so to do the city should repair, at the expense of the abutter. *Held*, that the lot-owners were not liable to individuals for injuries from defective sidewalks, but only to the city for repairs, and therefore, though the city was compelled to pay damages to the individual, it could not recover the amount from the abutter. *City of Rochester v. Campbell*, 25 N. E. Rep. 937 (N. Y.).

NUISANCE. — In an action to recover damages for maintaining a fertilizer factory from which noxious gases escape into the plaintiff's premises, it is not proper to submit to the jury the questions whether the location of the factory is convenient and proper for carrying on the business, and whether such use of the property is a reasonable one.

It is immaterial that a large amount of capital is invested in similar factories in the immediate neighborhood. *Susquehanna Fertilizer Co. v. Malone*, 20 Atl. Rep. 900 (Md.).

The opinions in *Tipping v. Smelting Co.*, 11 H. L. C. 642, are cited at length as exact statements of the law.

See also *Bohan v. Port Jervis Gas Co.*, 25 N. E. Rep. 246 (N. Y.), which decides that a gas company incorporated under the laws of New York cannot carry on its business so as to render adjoining property unfit for comfortable enjoyment, though all possible care is used to render the business inoffensive.

PROPERTY — ATTACHMENT — SALE OF PERISHABLE PROPERTY. — A purchaser at a sale of attached property, sold by order of the court as perishable, acquires title free from a landlord's lien which was prior to the attachment. The court puts this on the necessity of such a rule in order to obtain a fair price at such sale. *Betterton v. Eppstein*, 14 S. W. Rep. 861 (Tex.).

QUASI CONTRACTS — PAYMENT BY MISTAKE — NEGLIGENCE. — Where a payment in excess of the amount due is made by a debtor under a mistake of fact which ordinary diligence in looking up his receipts would have removed, the money cannot be recovered back. *Brummitt v. McGuire*, 12 S. E. Rep. 191 (N. C.).

REAL PROPERTY — BREACH OF COVENANT OF WARRANTY — MEASURE OF DAMAGES OF REMOTE VENDEE. — *Held*, a vendee who has lost his land by reason of a title paramount to that of his remote vendor is not limited in his recovery from such remote vendor for breach of warranty, to the amount which such vendee paid for the land, but may recover the amount which such remote vendor received for the land. *Brooks v. Black*, 8 So. Rep. 332 (Miss.).

REAL PROPERTY — DEEDS — DEFECTIVE ACKNOWLEDGMENT. — An officer who has made a defective certificate of a married woman's acknowledgment of a deed cannot correct the defect. There must be a reacknowledgment. The officer's term had expired, but he still held the office, by virtue of a re-election. *Griffith v. Ventress*, 8 So. Rep. 312 (Ala.).

REAL PROPERTY — DEEDS — DELIVERY. — A father conveyed an estate in land to his infant daughter in fee, and had the deed recorded, but thereafter kept it in his possession. *Held*, that the delivery of the deed to the registrar for record, and the recording thereof, was sufficient to pass the title to the grantees, and that the father should not be allowed to testify that he never intended to make an absolute conveyance. *Annis v. Wilson*, 25 Pac. Rep. 304 (Col.).

REAL PROPERTY — DEEDS — DELIVERY TO REGISTRAR. — The grantee of a deed delivered it to the registrar to be recorded. Through his negligence it was not recorded. The grantor subsequently conveyed the same land to a *bona fide* purchaser, who had examined the record and found no entry of the prior deed. *Held*, that the *bona fide* purchaser could not be charged with constructive notice of the unrecorded deed, and therefore took a perfect title. *Ritchie v. Griffiths*, 25 Pac. Rep. 341 (Wash.).

REAL PROPERTY — DELIVERY OF DEEDS. — The plaintiff's mother being very ill and fearing death made a deed by which she granted to the plaintiff her interest in certain land. The deed was given to the plaintiff, but it was the grantor's intention, and was so agreed by the plaintiff, that the deed should not take effect at all, except in case of the grantor's death. The mother recovered, and the defendant claimed the land in question, under a subsequent judgment against her and an execution sale.

Held, that as the deed was delivered to the grantee, it could not take effect as an escrow, and, therefore, was a valid deed from the time of its delivery, and passed the legal title to the plaintiff absolutely. *Mowry v. Heney*, 25 Pac. Rep. 17 (Cal.).

It would seem, however, that the court might have held that the transaction was an attempt to make a *donatio causa mortis* of real estate, and therefore was of no effect.

REAL PROPERTY — EASEMENTS IN HIGHWAYS — ELEVATED RAILROADS. — The owner of an abutting lot, though he has no interest in the fee of the street, has nevertheless easements of light, air, and access for which he can maintain an action for damages if they are impaired by the erection of an elevated railway. *Abendroth v. N. Y. El. R. Co.*, 25 N. E. Rep. 496 (N. Y.). See also 4 Harv. L. Rev. 70.

REAL PROPERTY — ESTOPPEL BY NEGLIGENCE — FALSE PRETENCES. — A deed or conveyance of real estate, perfect in form except that the grantee's name was left blank, was executed and acknowledged by the grantor and left with the defendant, who was to arrange the terms of the purchase with one of two persons named. The defendant fraudulently filled in his own name as grantee and had the deed recorded. He then executed a mortgage to a person who advanced money relying on the defendant's record title and ignorant of the fraud. *Held*, that the mortgage was valid, and that therefore the defendant was not guilty of obtaining money by false pretences from the mortgagor, as the latter had not been defrauded to his injury. *State v. Matthews*, 25 Pac. Rep. 6 (Kan.).

REAL PROPERTY — FIXTURES BETWEEN EXECUTOR OF TENANTS BY THE CURTESY AND REMAINDER-MAN. — Machinery attached to the realty by a tenant by the courtesy during his term, for the purpose of milling corn for the neighborhood goes on his death to his executor as against the remainder-man. *Overman v. Sasser*, 12 S. E. Rep. 64 (N. C.).

REAL PROPERTY — FIXTURES — LICENSE FROM LIFE-TENANT — REMOVAL. — One who has erected buildings on the land of a life-tenant has no right to remove them, under an agreement made with him by the life-tenant that he might erect and remove them. *Demby v. Parse*, 14 S. W. Rep. 899 (Ark.).

REAL PROPERTY — HUSBAND AND WIFE — CURTESY. — A married woman cannot, even with the written consent of her husband, devise her estate freed from the right to courtesy. *Middleton v. Steward*, 20 Atl. Rep. 846 (N. J.).

REAL PROPERTY — INHERITANCE — ADOPTED CHILD — COLLATERAL INHERITANCE TAX. — A legacy given to an illegitimate son, who, by an act of the Legislature authorizing the testator to adopt said child as his heir, was made the heir of said testator capable of inheriting "as if he had been born in lawful wedlock," is subject to the collateral inheritance tax. *Commonwealth v. Ferguson*, 20 Atl. Rep. 870 (Pa.).

REAL PROPERTY — INHERITANCE — RIGHTS OF ADOPTED CHILD. — A statute of Tennessee provides that an adopted child shall have the rights of a child as if born the child of the adopting parent, and shall be capable of inheriting and succeeding to the latter's real and personal estate as heir and next of kin. *Held*, that the act of adoption does not make the adopted child the heir and next of kin of children born to the adopting parent. *Helms v. Elliott*, 14 S. W. Rep. 930 (Tenn.).

REAL PROPERTY — LICENSE — REVOCATION. — The plaintiff's land was so situated that surface water from the land of the defendant ran over it. By agreement a drain was built, each constructing the part required on his own land through which water flowed constantly. This was of great benefit to the plaintiff, as it improved his land, and the water was of use for his cattle. *Held*, that as the plaintiff had expended money in building the drain under the agreement, the defendant was liable in damages for interrupting the flow of water by digging up the drain on his own land. *Ferguson v. Spencer*, 25 N. E. Rep. 1035 (Ind.).

STATUTE OF FRAUDS — MEMORANDUM. — A memorandum in an auctioneer's book of a sale of land was signed by the auctioneer and otherwise good, but did not name the vendor. *Held*, it was not a sufficient memorandum to comply with the Statute of Frauds. *Ments v. Newwitter*, 25 N. E. Rep. 1044 (N. Y.).

TELEGRAPH COMPANIES — STATUTORY PENALTIES — STIPULATIONS. — A provision in a telegraph blank, that all claims for damages for negligence in sending the despatch shall be made in writing within a certain time, or the company shall not be

liable, does not apply to an action for a statutory penalty for such negligence. *Western Union Tel. Co. v. Cooledge*, 12 S. E. Rep. 264 (Ga.).

TRUSTS.—Land was conveyed to certain persons in trust, on condition that they build thereon a house of worship when they thought fit, and permit certain persons to preach in said church, and that the trustees should permit the building to be used "for such other purposes as should be deemed appropriate and necessary to further the cause of Christ." There was nothing in the deed in the nature of a covenant to rebuild, or words indicating a desire on the part of the grantor that the land should revert upon a failure of the trustees to maintain the church. *Held*, that a church having been erected thereon, and used as long as it was fit for use, the trustees might sell the land, and invest the proceeds in a parsonage for the same congregation in connection with a new church on a different lot. *Hardy v. Wiley*, 12 S. E. Rep. 233 (Va.).

REVIEWS.

ESSENTIALS OF LEGAL MEDICINE, TOXICOLOGY, AND HYGIENE. By C. E Armand Semple, M.D. W. B. Saunders, Philadelphia, 1890. 12mo. Pages 196.

This small volume contains the only condensation of this comprehensive subject which has yet been published. It is intended primarily to aid the physician in preparing and presenting evidence, either as an ordinary witness or as an expert in cases which involve medical questions. For this purpose the possible sources and kinds of evidence in such cases, and the value of each, are set forth with sufficient fulness to make the book useful in the hands of a student of medicine, either as an introduction to the subject or means of review. The rules of law which deal with such evidence are very briefly enunciated.

The value of the work to the lawyer must also be great, though not by way of introduction. The familiar use of technical terms will prevent that; but the later labor of keeping fresh in memory the main lines of proof that may be followed in dealing with such questions as personal identity, infanticide, causes of death, and effects of poisons, is lightened by such a handy compendium as this.

P. G. B.

LEADING ARTICLES IN EXCHANGES.

American Law Review. Vol. 25. Review Pub. Co., St. Louis, Mo.

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AGENCY.

NOTE. — These papers are two lectures delivered by me when I was a professor at the Law School of Harvard College, and now are printed at the request of the Editors of this REVIEW. My other occupations have made it impossible for me to revise what I wrote more than eight years ago. I can only say that I studied the subject carefully then, and have seen no reason to change my opinions.

I PROPOSE in these lectures to study the theory of agency at common law, to the end that it may be understood upon evidence, and not merely by conjecture, and that the value of its principles may be weighed intelligently. I first shall endeavor to show why agency is a proper title in the law. I then shall give some general reasons for believing that the series of anomalies or departures from general rule which are seen wherever agency makes its appearance must be explained by some cause not manifest to common sense alone; that this cause is, in fact, the survival from ancient times of doctrines which in their earlier form embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since, and that in modern days these doctrines have been generalized into a fiction, which, although nothing in the world but a form of words, has reacted upon the law and has tended to carry its anomalies still farther. That fiction is, of course, that, within the scope of the agency, principal and agent are one. I next shall examine the early law of England upon every branch of the subject,—tort, contract, possession, ratification,—and show the working of survival or fiction in each. If I do not succeed in reducing the law of all these branches to a common

term, I shall try to show that at least they all equally depend upon fiction for their present existence. I shall prove incidentally that agency in its narrower sense presents only a special application of the law of master and servant, and that the peculiar doctrines of both are traceable to a common source. Finally I shall give my reasons for thinking that the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.

A part of my task has been performed and my general view indicated in my book on the Common Law. It remains to discuss the matter systematically and in detail, giving due weight to the many difficulties or objections which are met with in the process.

My subject extends to the whole relation of master and servant—it is not confined to any one branch; so that when I choose the title "Agency," I do not use it in the strict sense just referred to, but as embracing everything of which I intend to treat.

The first question proposed is why agency is a proper title in the law. That is to say, Does agency bring into operation any new and distinct rules of law? do the facts which constitute agency have attached to them legal effects which are peculiar to it, or is the agency only a dramatic situation to which principles of larger scope are applied? And if agency has rules of its own incapable of being further generalized, what are they?

If the law went no farther than to declare a man liable for the consequences of acts specifically commanded by him with knowledge of circumstances under which those consequences were the natural results of those acts, it would need no explanation and introduce no new principle. There may have been some difficulty in arriving at this conclusion when the intervening agent was a free person and himself responsible. Speaking without special investigation, I do not remember any case in early law in which one could charge himself thus in contract or even in tort. Taking the allied case of joint trespassers, although it long has been settled that each wrong-doer is liable for the entire damages, the objection that "the battery of one cannot be the battery of the other" prevailed as late as James I.¹ It is very possible that lia-

¹ Sampson *v.* Cranfield, 1 Bulstr. 157 (T. 9 Jac.).

bility even for the commanded acts of a free person first appeared as an extension of the liability of an owner for similar acts by his slave.

But however this may be, it is plain good sense to hold people answerable for wrongs which they have intentionally brought to pass, and to recognize that it is just as possible to bring wrongs to pass through free human agents as through slaves, animals, or natural forces. This is the true scope and meaning of "*Qui facit per alium facit per se*," and the English law has recognized that maxim as far back as it is worth while to follow it.¹ So it is only applying the general theory of tort to hold a man liable if he commands an act of which the natural consequence, under the circumstances known to him, is harm to his neighbor, although he has forbidden the harm. If a trespass results, it is as much the trespass of the principal as if it were the natural, though unwished-for, effect of a train of physical causes.² In such cases there is nothing peculiar to master and servant; similar principles have been applied where independent contractors were employed.³

No additional explanation is needed for the case of a contract specifically commanded. A difficulty has been raised concerning cases where the agent has a discretion as to the terms of the contract, and it has been called "absurd to maintain that a contract which in its exact shape emanates exclusively from a particular person is not the contract of such person [*i. e.*, the agent], but is the contract of another."⁴ But I venture to think that the absurdity is the other way, and that there is no need of any more complex machinery in such a case than where the agent is a mere messenger to express terms settled by his principal in every detail. Suppose that the principal agrees to buy a horse at a price to be fixed by another. The principal makes the contract, not the referee who settles the price. If the agreement is communicated by messenger, it makes no difference. If the messenger is himself the referee, the case is still the same. But that is the case of an agent with discretionary powers, no matter how large they may

¹ In Tort: Y. B. 32 Ed. I. 318, 320 (Harwood); 22 Ass. pl. 43, fol. 94; 11 H. IV. 90, pl. 47; 9 H. VI. 53, pl. 37; 21 H. VI. 39; 4 Ed. IV. 36; Dr. & Stud., II. c. 42; Seaman & Browning's Case, 4 Leon. 123, pl. 249 (M. 31 Eliz.). Conveyance: Fitz. Abr. *Annuities*, pl. 51 (H. 33 Ed. I.), where the maxim is quoted. Account: 4 Inst. 109.

² Gregory v. Piper, 9 B. & C. 591. Cf. The Common Law, 53, 54, and Lect. 3 and 4.

³ Bower v. Peate, 1 Q. B. D. 321.

⁴ Thöl, *Handelsrecht*, sect. 70, cited in Wharton, *Agency*, sect. 6.

be. So far as he expresses his principal's assent to be bound to terms to be fixed by the agent, he is a mere messenger; in fixing the terms he is a stranger to the contract, which stands on the same footing as if it had been made before his personal function began. The agent is simply a voice affording the marks provided by the principal's own expression of what he undertakes. Suppose a wager determined in amount as well as event by the spinning of a teetotum, and to be off if numbers are turned up outside certain limits; is it the contract of the teetotum?

If agency is a proper title of our *corpus juris*, its peculiarities must be sought in doctrines that go farther than any yet mentioned. Such doctrines are to be found in each of the great departments of the law. In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principal may bind or may be bound to another, who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control. The existence of these rules is what makes agency a proper title in the law.

I do not mean to assume in advance that these rules have a common origin because they are clustered round the same subject. It would be possible to suggest separate reasons for each, and going farther still, to argue that each was no more than an application, even though a misapplication, of general principles.

Thus, in torts it is sometimes said that the liability of the master is "in effect for employing a careless servant," repeating the reason offered by the pseudo-philosophy of the Roman jurists for an exceptional rule introduced by the *prætor* on grounds of public policy.¹ This reason is shown to be unsound by the single fact that no amount of care in selection will exonerate the master;² but still it might be argued that, whether right or wrong, this or some other notion of policy had led to the first of the rules which I selected as peculiar, and that at most the liability of a master for his

¹ Parke, B., in *Sharrod v. London & N. W. Ry. Co.*, 4 Exch. 580, 585 (1849); 1 Austin, *Jurisprudence*, Lect. 26, 3d ed., p. 513. Cf. *The Common Law*, 15, 16.

² *Dansey v. Richardson*, 3 El. & Bl. 144, 161.

servant's torts is only a mistaken conclusion from the general theory of tort.

Then with regard to undisclosed principals in contract, it might be said that it was no hardship to hold a man bound who had commanded his servant to bind him. And as to the other and more difficult half of the doctrine, the right of an undisclosed principal to sue, it might be observed that it was first asserted in cases of debt,¹ where the principal's goods were the consideration of the liability, and that the notion thus started was afterwards extended to other cases of simple contract. Whether the objections to the analogy and to the whole rule were duly considered or not, it might be urged, there is no connection other than a purely dramatic one between the law of agency in torts and in contracts, or between the fact of agency and the rule, and here, as there, nothing more is to be found than a possibly wrong conclusion from the general postulates of the department of law concerned.

Ratification, again, as admitted by us, the argument would continue, merely shows that the Roman maxim "*ratihabitio mandato comparatur*" has become imbedded in our law, as it has been from the time of Bracton.

Finally, the theory of possession through servants would be accounted for by the servant's admission of his master's present right to deal with the thing at will, and the absence of any claim or intent to assert a claim on his part, coupled with the presence of such a claim on the part of the master.

But the foregoing reasoning is wholly inadequate to justify the various doctrines mentioned, as I have shown in part and as I shall prove in detail hereafter. And assuming the inadequacy to be proved, it cannot but strike one as strange that there should run through all branches of the law a tendency to err in the same direction. If, as soon as the relation of master and servant comes in, we find the limits of liability for, or gain by, others' acts enlarged beyond the scope of the reasons offered or of any general theory, we not only have good ground for treating that relation separately, but we fairly may suspect that it is a cause as well as a concomitant of the observed effects.

Looking at the whole matter analytically it is easy to see that

¹ *Scrimshire v. Alderton*, 2 Strange, 1182 (H. 16 G. II.). Cf. *Gurratt v. Cullum* (T. 9 Anne, B. R.), stated in *Scott v. Surman, Willes*, 400, at p. 405 (H. 16 G. II.), and in *Buller, N. P.* 42.

if the law did identify agents with principals, so far as that identification was carried the principal would have the burden and the benefit of his agent's torts, contracts, or possession. So, framing a historical hypothesis, if the starting-point of the modern law is the *patria potestas*, a little study will show that the fiction of identity is the natural growth from such a germ.

There is an antecedent probability that the *patria potestas* has exerted an influence at least upon existing rules. I have endeavored to prove elsewhere that the unlimited liability of an owner for the torts of his slave grew out of what had been merely a privilege of buying him off from a surrender to the vengeance of the offended party, in both the early Roman and the early German law. I have shown, also, how the unlimited liability thus established was extended by the prætor in certain cases to the misconduct of free servants.¹ Of course it is unlikely that the doctrines of our two parent systems should have been without effect upon their offspring, the common law.

The Roman law, it is true, developed no such universal doctrines of agency as have been worked out in England. Only innkeepers and shipowners (*nautae, caupones, stabularii*) were made answerable for the misconduct of their free servants by the prætor's edict. It was not generally possible to acquire rights or to incur obligations through the acts of free persons.² But, so far as rights of property, possession,³ or contract⁴ could be acquired through others not slaves, the law undoubtedly started from slavery and the *patria potestas*.

It will be easy to see how this tended toward a fictitious identification of agent with principal, although within the limits to which it confined agency the Roman law had little need and made little use of the fiction. Ulpian says that the act of the family cannot be called the act of the *paterfamilias* unless it is done by his wish.⁵ But as all the family rights and obligations were simply attributes of the *persona* of the family head, the summary expression for the members of the family as means of loss or gain would be that they sustained that *persona, pro hac vice*. For that

¹ *The Common Law*, 9, 15-20.

² Inst. 2, 9, § 5; D. 44, 7, 11; D. 45, 1, 126, § 2.

³ Inst. 2, 9, esp. §§ 4, 5. Cf. D. 41, 1, 53.

⁴ Inst. 3, 17; D. 41, 1, 53; D. 45, 1, 38, § 17.

⁵ D. 43, 16, 1, §§ 11-13.

purpose they were one with the *paterfamilias*. Justinian's Institutes tell us that the right of a slave to receive a binding promise is derived *ex persona domini*.¹ And with regard to free agents, the commentators said that in such instances two persons were feigned to be one.²

Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. The Roman prætor did not make innkeepers answerable for their servants because "the act of the servant was the act of the master," any more than because they had been negligent in choosing them. He did so on substantive grounds of policy — because of the special confidence necessarily reposed in innkeepers. So when it was held that a slave's possession was his owner's possession, the practical fact of the master's power was at the bottom of the decision.³

But when such a formula is adopted, it soon acquires an independent standing of its own. Instead of remaining only a short way of saying that when from policy the law makes a master responsible for his servant, or because of his power gives him the benefit of his slave's possession or contract, it treats him *to that extent* as the tort-feasor, possessor, or contractee, the formula becomes a reason in itself for making the master answerable and for giving him rights. If "the act of the servant is the act of the master," or master and servant are "considered as one person," then the master must pay for the act if it is wrongful, and has the advantage of it if it is right. And the mere habit of using these phrases, where the master is bound or benefited by his servant's act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about.

I shall examine successively the English authorities with regard to agency in tort, contract, ratification, and possession. But some of those authorities are of equal importance to every branch of the proposed examination, and will prove in advance that the foregoing remarks are not merely hypothetical. I therefore begin with citations sufficient to establish that family headship was recognized as a factor in regal rights and duties; that this

¹ Inst. 3, 17, pr. 18, in the older editions.

² D. 45, 1, 38, § 17, Elzevir ed. Gothofred, note 74. Cf. D. 44, 2, 4, note 17.

³ The Common Law, 228.

notion of headship was extended by analogy so as to cover the relation of a master to freemen filling a servile place for the time being, and that the relations thus embraced were generalized under the misleading fiction of identity.

The *familia*, Bracton says, embraces "those who are regarded in the light of serfs, such as, &c. So, too, as well freemen as serfs, and those over whom one has the power of command."¹

In West's *Symboleography*,² a work which was published towards the beginning of the reign of James I., and which, though mainly a form book, gives several glimpses of far-reaching insight, we read as follows: —

"The person is he which either agreeth or offendeth, and beside him none other.

"And both may be bound either mediately, or immediately.

"Immediately, if he which is bound doe agree.

"Mediately, when if he, which by nature differeth from him, but not by law, whereby as by some bond he is fained to be all one person, doth contract, or offend, of which sort in some cases be those which be in our power, as a wife, a bondman, servant, a factor, an Attourney, or Procurator, exceeding their authority."

Here we see that the *patria potestas* is the substantive ground, that it is extended to cover free agents, who are not even domestic servants, and that it finds its formal expression in the fiction of identity.

So, at the beginning of the next reign, it was said that an action for fire, due to the negligence of a wife, or servant, lay "vers patrem *familias*".³ The extension of the liability, as shown by West, is sometimes expressed in later books by saying that it is not confined to cases where the party stands in the relation of *paterfamilias* to the wrong-doer;⁴ but this only means that the rule extends to other servants besides domestic servants, and admits the analogy or starting-point.⁵

Every one is familiar with the fiction as applied to married

¹ "Et etiam familiae appellatio eos complectitur qui loco servorum habentur, sicut sunt mercenarii et conductitii. Item tam liberi quam servi, et quibus poterit imperari." Bract., fol. 171 b.

² Lib. I., Sect. 3, *ad fin.* "Of the Fact of Man."

³ Shelley & Barr's Case, 1 Roll. Abr. 2, pl. 7 (M. 1 Car. I.).

⁴ Bac. Abr., *Master and Servant*, K.; Smith's *Master & Servant*, 3d ed., 260.

⁵ Laugher *v.* Pointer, 5 B. & C. 547, 554 (1826). Cf. Bush *v.* Steinman, 1 Bos. & P. 404 (1799).

women. The early law dealt with married women on the footing of servants. It called both wives and servants chattels.¹ The wife was said to be in the nature of a servant,² and husband and wife were only one person in law.³ So far was this identification carried, so far was the *persona* of the wife swallowed up in and made part of her husband's, that whereas, in general, assigns could not vouch upon a warranty unless they were expressly mentioned in it,⁴ a husband could always vouch upon a warranty made to his wife before marriage. By marriage, as was said in Simon Simeon's case, "it vested in the person of the husband." That is to say, although what actually happened was that the right to enforce a contract was transferred to a stranger, in theory of law there was no transfer, because the stranger had become the same person as the contractee.⁵

Of course the identification between husband and wife, although by no means absolute, was far more complete than that between master and menial servant, just as in the latter case it went farther than in that of an agent employed for some particular transaction. Even in the case of villeins, while the lord might take advantage of their possession or their title, he could not take advantage of contracts or warranties made to them.⁶ But the idea and its historical starting-point were the same throughout. When considering the later cases, the reader will remember that it is incontrovertibly established that a wife was on the footing of a servant, that the consequences of the relation were familiarly expressed in terms of the fiction of identity, and, therefore, that the applicability of this fiction to the domestic relations generally must have been well known to the courts long before the date of the principal decisions, which it will be my task to interpret.

I now take up the liability of a master for the torts of his

¹ Y. B. 19 H. VI. 31, pl. 59; 2 Roll. Abr. 546 (D).

² 1 Roll. Abr. 2, pl. 7.

³ Dial. de Scaccario II, c. 18; Bract., fol. 429*b*; Y. B. 22 H. VI. 38, pl. 6; Litt. §§ 168, 191; 3 Salk. 46; Com. Dig. *Baron & Feme* (D); 1 Bl. Comm. 442.

⁴ *The Common Law*, 375, n. 2, 401, n. 1.

⁵ Simon Simeon's Case, Y. B. 30 Ed. III. 14; s. c. ib. 6; 29 Ed. III. 48. I have seen no reason to change the views expressed in *The Common Law*, Lecture XI, to meet the suggestions of Prof. Ames in 3 Harv. Law Rev. 388, n. 6. Undoubtedly the letter of credit was known in the reign of Henry III. Royal letter, Hen. III. 315. But the modern theory of contract applied to letters of credit, in my opinion, was not the theory on which assigns got the benefit of a warranty. *Norcross v. Ames*, 140 Mass. 188.

⁶ Y. B. 22, Ass. pl. 27, fol. 93; Co. Lit. 117 *a*.

servant at common law. This has been supposed in England to have been manufactured out of the whole cloth, and introduced by the decision in *Michael v. Alestree*¹ in the reign of Charles II. In view of the historical antecedents it would be very extraordinary if such a notion were correct. I venture to think that it is mistaken, and that the principle has gradually grown to its present form from beginnings of the earliest date. I also doubt whether *Michael v. Alestree* is an example for the principle in question. It rather seems to me a case in which the damage complained of was the natural consequence of the very acts commanded by the master, and which, therefore, as I have said above, needs no special or peculiar doctrine to account for it. It was an action on the case against master and servant; "for that the Defendants in *Lincoln's-Inn Fields*, a Place where People are always going to and fro about their Business, brought a Coach with two ungovernable Horses, & *eux improvide incante & absque debita consideratione ineptitudinis loci* there drove them to make them tractable and fit them for a Coach; and the Horses, because of their Ferocity, being not to be managed, ran upon the Plaintiff, and ** wounded him: The master was absent," but both defendants were found guilty. "It was moved in Arrest of Judgment, That no *Sciens* is here laid of the Horses being unruly, nor any Negligence alledged, but *e contra*, That the Horses were ungovernable: Yet judgment was given for the Plaintiff, for it is alledged that it was *improvide & absque debita consideratione ineptitudinis loci*; and it shall be intended the Master Sent the servant to train the Horses there."² In other words, although there was no negligence averred in the mode of driving the horses at the instant of the accident, but, *e contra*, that the horses were ungovernable, which was the scope of the defendant's objection, there was negligence in driving ungovernable horses for the purpose of breaking them in a public place, and that was averred, and was averred to have been done negligently. Furthermore, it was averred to have been done negligently by the defendant, which was a sufficient allegation on its face, and would be supported by proof that the defendant, knowing the character of the horses, ordered his servant to break them in a public resort. Indeed, the very character of the command (to break horses) imports sufficient knowledge;

¹ 2 Levinz, 172; s. c. 3 Keble, 650, 1 Ventris, 295 (T. 28 Car. II.).

² 2 Lev. 172.

and when a command is given to do the specified act complained of, it always may be laid as the act of the party giving the order.¹

When I come to investigate the true history of this part of the law, notwithstanding the likelihood which I have pointed out that it was a continuation and development of what I have traced in one or both of the parent systems, I must admit that I am met with a difficulty. Even in Bracton, who writes under the full influence of the Roman law, I have failed to find any passage which distinctly asserts the civil liability of masters for their servants' torts, apart from command or ratification. There is one text, to be sure, which seems corrupt as it stands and which could be amended by conjecture so as to assert it. But as the best manuscripts in Lincoln's Inn substantially confirm the printed reading, conjecture would be out of place.²

On the other hand, I do find an institution which may or may not have been connected with the Anglo-Saxon laws touching the responsibility of masters, but which, at any rate, equally connects liability of a different sort with family headship.

At about the time of the Conquest, what was known as the *Frith-borh*, or frankpledge, was either introduced or grew greatly in importance. Among other things, the master was made the pledge of his servants, to hand them over to justice or to pay the fine himself.

"*Omnis qui servientes habent, eorum sint francplegii,*" was the requirement of William's laws. Bracton quotes the similar provisions of Edward the Confessor, and also says that in some counties a man is held to answer for the members of his family.³ This quasi-criminal liability of master for man is found as late as Edward II. alongside of the other rules of frankpledge, with which this discussion is not concerned. Fitzherbert's Abridgment⁴ reads as follows: "Note that if the servant (*serviens*) of any lord while in his service (*in servicio suo existens*) commits a felony and is convicted, although after the felony (the master) has not received him, he is to be amerced, and the reason is because he received him 'in bourgh.'" Bracton, in like manner, says that the master is bound "*Emendare*" for certain

¹ *Sug.* p. 346, n.

² *Bract.*, fol. 115 *a*.

³ "Tenebitur ille, in quibusdam partibus, de cuius fuerint familia et manupastu." *Bract.*, fol. 124 *b*; *i.e.*, for the persons under his *patria potestas*. *LL. Gul.* I. c. 52; *LL. Edw. Conf.* c. 21 (al. 20).

⁴ *Corone*, pl. 428 (3 Ed. II. It. canc.).

torts of his servant,¹ meaning, as I take it, to pay a fine, not damages.

But true examples of the peculiar law of master and servant are to be found before Edward II. The maxim *respondeat superior* has been applied to the torts of inferior officers from the time of Edward I. to the present day. Thus that chapter of the Statute of Westminster the Second,² which regulates distresses by sheriffs or bailiffs, makes the officer disregarding its provisions answerable, and then continues, "*si nom habeat ballivus unde reddat reddit superior suus.*" So a later chapter of the same statute, after subjecting keepers of jails to an action of debt for escapes in certain cases, provides that if the keeper is not able to pay, his superior, who committed the custody of the jail to him, shall be answerable by the same writ.³ So, again, the eighteenth chapter of the Articuli super Chartas⁴ gives a writ of waste to wards, for waste done in their lands in the king's hands by escheators or sub-escheators, "against the escheator for his act, or the sub-escheator for his act (if he have whereof to answer), and if he have not, his master shall answer ('*si respoigne son sovereign*') by like pain concerning the damages, as is ordained by the statute for them that do waste in wardships." A case of the time of Edward II. interpreting the above statute concerning jailers is given in Fitzherbert's Abridgment,⁵ and later similar cases are referred to in Coke's Fourth Institute.⁶

It may be objected that the foregoing cases are all statutory. But the same principle seems to have been applied apart from any statute except that which gave counties the power to elect coroners, to make the county of Kent answerable to the king for a coroner's default, as well as in other instances which will be mentioned later.⁷ Moreover, early statutes are as good evidence of prevailing legal conceptions as decisions are.

¹ Bract., fol. 158 b, 171 a, b, 172 b. Cf. Ducange, "*Emenda.*"

² St. 13 Ed. I., St. I, c. 2, § 3.

³ c 11, *ad finem*. "Et si custos gaole non habeat per quod justicietur vel unde solvat *respondeat superior suus* qui custodiari hujusmodi gaole sibi commisit per idem breve."

⁴ St. 28 Ed. I., c. 18.

⁵ *Dette*, pl. 172 (M. 11 Ed. II.).

⁶ 4 Inst. 114; "45 E. 3, 9, 10. *Prior datife et removeable suffer eschape, respondeat superior.* 14 E. 4. *Pur insufficiency del bailie dun libertie respondeat dominus libertatis.* Vid. 44 E. 3, 13; 50 E. 3, 5; 14 H. 4, 22; 11 H. 6, 52; 30 H. 6, 32."

⁷ See the writ of H. 14 Ed. III. ex parte Remem. Regis, rot. 9, in Scacc. in 4 Inst. 114, and less fully in 2 Inst. 175. "Et quia ipse coronator electus erat per comitatum juxta

But again it may be objected that there were special grounds of public policy for requiring those who disposed of public offices of profit to appoint persons "for whom they will answer at their peril," in the words of another similar statute as to clerks in the King's Courts.¹ It might be said with truth that the responsibility was greater than in the case of private servants, and it might be asked whether *respondeat superior* in its strict sense is not an independent principle which is rather to be deemed one of the causes of the modern law, than a branch from a common stem. It certainly has furnished us with one of the inadequate reasons which have been put forward for the law as it is,— that somebody must be held who is able to pay the damages.

The weight of the evidence seems to me to overcome these objections. I think it most probable that the liability for under-officers was a special application of conceptions drawn from the family and the power of the family head over his servants. Those conceptions were in existence, as I have shown. From a very early date, under-officers are called servants of their superior, as indeed it seems to be implied that they are, by the word "*sovereign*," or even "*superior*," in the statutes which have been cited. "*Sovereign*" is used as synonymous with master in Dyer.² In the Y. B. 11 Edward IV. 1, pl. 1, it is said, "If I make a deputy, I am always officer, and he performs the office in my right and as my servant;" and from that day to this, not only has the same language been repeated,³ but, as I shall show, one of the chosen fields for the express use of the fiction of identity is the relation of superior and under-officer.

Under Edward III. it was held that if an abbot has a wardship, and a co-canonical commits waste, the abbot shall be charged by it, "for that is adjudged the deed of the abbot."⁴ This expression appears to me not only to apply the rule *respondeat superior* beyond the case of public officers, but to adopt the fiction of identity as a mode of explaining the rule.

formam statuti, etc. ita quod in defectu ejusdem coronatoris totus comitatus ut elector et superior, etc. (tenetur), habeant regi respondere, praecip (praeceptum fuit) nunc vic' quod de terris et tenementis (hominum) hujusmodi totius comitatus in balliva sua fieri fac." etc. See the other references in 4 Inst. 114, and further Y. B. 49 Ed. III. 25, 26, pl. 3.

¹ St. 2 H. VI., c. 10.

² Alford *v.* Egglefield, Dyer, 230 b, pl. 56. The passage will be cited later in dealing with factors. See also Y. B. 27 H. VIII. 24, pl. 3.

³ Parkes *v.* Mosse, Cro. Eliz. 181 (E. 32 Eliz.); Wheteley *v.* Stone, 2 Roll. Abr. 556, pl. 14; s. c. Hobart, 180; 1 Bl. Comm. 345, 346.

⁴ Y. B. 49 Ed. III. 25, 26, pl. 3.

An earlier record of the same reign, although it turned on the laws of Oleron, shows that the King's Court would in some cases hold masters more strictly accountable for their servants' torts than is even now the case. A ship-master was held liable in trespass *de bonis asportatis* for goods wrongfully taken by the mariners, and it was said that he was answerable for all trespasses on board his ship.¹

A nearly contemporaneous statute is worth mentioning, although it perhaps is to be construed as referring to the fines which have been mentioned above, or to other forfeitures, and not to civil damages. It reads, "That no merchant nor other, of what condition that he be, shall lose or forfeit his goods nor merchandizes for the trespass and forfeiture of his servant, unless he do it by the commandment or procurement of his master, or that he hath offended in the office in which his master hath set him, or in other manner, that the master be holden to answer for the deed of his servant by the law-merchant, as elsewhere is used."² The statute limits a previously existing liability, but leaves it open that the master still shall be holden to answer for the deed of his servant in certain cases, including those of the servant's offending in the office in which the master hath set him. It is dealing with merchants, to be sure, but is another evidence that the whole modern law is of ancient extraction.

It must be remembered, however, that the cases in which the modern doctrines could have been applied in the time of the Year Books were exceedingly few. The torts dealt with by the early law were almost invariably wilful. They were either prompted by actual malevolence, or at least were committed with full foresight of the ensuing damage.³ And as the judges from an early day were familiar with the distinction between acts done by a man on his own behalf and those done in the capacity of servant,⁴ it is obvious that they could not have held masters gener-

¹ *Brevia Regis in Turr.* London, T. 24 Ed. III., No. 45, Bristol, printed in Molloy, Book 2, ch. 3, § 16.

² St. 27 Ed. III. St. 2, cap. 19.

³ The Common Law, 3, 4, 101-103. I do not mean as a matter of articulate theory, but as a natural result of the condition of things. As to very early principles of liability see now Dr. Brunner's most learned and able discussion in *Sitzungsberichte der kön. Preuss. Akademie der Wissensch.* xxxv. July 10, 1890. Über absichtlose Missethat im Altdutschen Strafrechte. Some of the cases mentioned by him, such as Beowulf, 2435, had come to my notice.

⁴ See, e.g., Gascoigne in Y. B. 7 H. IV. 34, 35, pl. 1.

ally answerable for such torts unless they were prepared to go much beyond the point at which their successors have stopped.¹ Apart from frauds² and intentional trespasses against the master's will³ I only know of one other case in the Year Books which is important to this part of my subject. That, however, is very important. It is the case concerning fire,⁴ which was the precedent relied on by Lord Holt in deciding *Turberville v. Stampe*,⁵ which in its turn has been the starting-point of the later decisions on master and servant.⁶ I therefore shall state it at length.

Beaulieu sued Finglam, alleging that the defendant so negligently guarded his fire that for want of due guard of the same the plaintiff's houses and goods were burned. Markham [J.], A man is held to answer for the act of his servant or of his guest (*hosteller*) in such case; for if my servant or my guest puts a candle on a beam, (*en un pariet*,) and the candle falls in the straw, and burns all my house, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage which he has, *quod concedebatur per curiam*. Horneby [of counsel], Then he should have had a writ, *Quare domum suam ardebat vel exarsit*. Hull [of counsel], That will be against all reason to put blame or default in a man where there is (*il ad*) none in him; for negligence of his servants cannot be called his feasance. Thirning [C. J.], If a man kills (*tue ou occist*) a man by misfortune he will forfeit his goods, and he must have his charter of pardon *de grace*. *Ad quod Curia concordat*. Markham, I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained (*hoste*) by me or by my servant, if he does, or any one of them does such a thing, as with a candle (*come de chandel*), or other thing, by which feasance the house of my neighbor is burned; but if a man from outside my house, against my will, puts the fire in the straw of my house, or elsewhere, by which my house is burned and also the houses of my neighbor are burned, for that I shall not be held to answer to them, etc., for this cannot

¹ Cf. Dr. & Stud. Dial. 2, c. 42 (A.D. 1530).

² Y. B. 9 H. VI. 53, pl. 37.

³ Y. B. 13 H. VII. 15, pl. 10. Cf. Keilway, 3 6, pl. 7 (M. 12 H. VII.).

⁴ Y. B. 2 H. IV. 18, pl. 6.

⁵ Carthew, 425, shows that the Year Book was cited. And the language of Lord Holt, reported in 1 Ld. Raym. 264, shows that he had it before his mind.

⁶ Brucker *v.* Fromont, 6 T. R. 659; M'Manus *v.* Crickett, 1 East, 106; Patten *v.* Rea, 2 C. B. N. S. 606.

be said to be through ill-doing (*male*) on my part, but against my will. Horneby then said that the defendant would be ruined if this action were maintained against him. "Thirning [C. J.], What is that to us? It is better that he should be undone wholly, than that the law should be changed for him.¹ Then they were at issue that the plaintiff's house was not burned by the defendant's fire."

The foregoing case affords some ground for the argument which was vainly pressed in *Turberville v. Stampe*, that the liability was confined to the house.² Such a limit is not unsupported by analogy. By the old law a servant's custody of his master's things was said to be the master's possession within his house, but the servant's on a journey outside of it.³ So an innkeeper was liable for all goods within the inn, whether he had the custody of them or not.⁴ So in the case which has been mentioned above, a master was said to be responsible for the acts of his servants on board ship. It will be noticed also that the responsibility of a householder seems to be extended to his guests. From that day to this there have been occasional glimpses of a tendency to regard guests as part of the *familia* for the purposes of the law.⁵ And in view of the fact that by earlier law if a guest was allowed to stop in the house three days, he was called *hoghenehine* or *agenhine*, that is, *own hine* or servant of the host, it may be thought that we have here an echo of the *frithborh*.⁶ But with whatever limits and for whatever occult causes, the responsibility of the head of the house for his servants was clearly recognized, and, it would seem, the identification of the two, notwithstanding a statement by counsel, as clear as ever has been made since, of the objections to the doctrine.

The later cases in the Year Books are of wilful wrongs, as I have said, and I now pass to the subsequent reports. Under Elizabeth a defendant justified taking sheep for toll under a usage to have toll of strangers' sheep driven through the vill by strangers, and if he were denied by such stranger driving them, to distrain them. The defendant alleged that the plaintiff, the owner of the sheep, was a stranger, but did not allege that the driver was. But the court

¹ Y. B. 2 H. IV. 18, pl. 6.

² See also 1 Bl. Comm. 431; Noy's Maxims, c. 44.

³ Y. B. 21 H. VII. 14, pl. 21; The Common Law, 226.

⁴ Y. B. 42 Ass., pl. 17, fol. 260; 42 Ed. III. 11, pl. 13.

⁵ Y. B. 13 Ed. IV. 10, pl. 5; *Southcote v. Stanley*, 1 H. & N. 247, 250.

⁶ Bract., fol. 124 b; LL. Gul. I., c. 48; LL. Edw. Conf., c. 23.

sustained the plea, saying, "The driving of the servant is the driving of the master; and if he be a foreigner, that sufficeth."¹

I leave on one side certain cases which often have been cited for the proposition that a master is chargeable for his servant's torts, because they may be explained otherwise and make no mention of it.²

The next evidence of the law to which I refer is the passage from West's *Symbology* which was given in full at the outset, and which gives the modern doctrine of agency as well as the fiction of identity in their full development. There are two nearly contemporaneous cases in which unsuccessful attempts were made to hold masters liable for wilful wrongs of their servants, in one for a piracy,³ in the other for a fraud.⁴ They are interesting chiefly as showing that the doctrine under discussion was in the air, but that its limits were not definitely fixed. The former sought to carry the rule *respondeat superior* to the full extent of the early statutes and cases which have been referred to, and cited the Roman law for its application to public affairs. The latter cites *Doctor and Student*. West also, it will have been noticed, indicates Roman influence.

Omitting one or two cases on the liability of the servant, which will be mentioned shortly, I come once more to a line of authorities touching public officers. I have said that although there was a difference in the degree of responsibility, under-officers always have been said to be servants.

Under Charles II. this difference was recognized, but it was laid down that "the high sheriff and under-sheriff is one officer," and on that ground the sheriff was held chargeable.⁵ Lord Holt expressed the same thought: "What is done by the deputy is done by the principal, and it is the act of the principal," or, as it is put in the margin of the report, "Act of deputy may forfeit office of prin-

¹ *Smith v. Shepherd*, Cro. Eliz. 710; M. 41 & 42 Eliz. B. R.

² The most important is Lord North's case, *Dyer*, 161 a (T. 4 & 5 Phil. & M.); but there the master was a bailee bound to return at his peril (cf. *The Common Law*, 175-179). In *Dyer*, 238 b, pl. 38 (E. 7 Eliz.), a customer of a port was said to be liable to the penalties for a false return, although he made it through the concealment of his deputy. One or both of these cases are cited in *Waltham v. Mulgar, Moore*, 776; *Southern v. How, Popham*, 143; *Boson v. Sandford*, 1 Shower, 101; *Lane v. Cotton*, 12 Mod. 472, 489, etc.

³ *Waltham v. Mulgar, Moore*, 776 (P. 3 Jac. I.).

⁴ *Southern v. How*, Cro. Jac. 468; s. c. *Popham*, 143; 2 Roll. Rep., 5, 26; *Bridgman* 125, where the special verdict is set forth.

⁵ *Cremer v. Humberston*, 2 Keble, 352 (H. 19 & 20 Car. II.).

cipal, because it is *quasi* his act.”¹ Later still, Blackstone repeats from the bench the language of Charles’s day. “There is a difference between master and servant, but a sheriff and all his officers are considered in cases like this as one person.” So his associate judge, Gould, “I consider [the under-sheriff’s clerk] as standing in the place of, and representing the very persons of . . . the sheriffs themselves.”² Again, the same idea is stated by Lord Mansfield: “For all civil purposes the act of the sheriff’s bailiff is the act of the sheriff.”³ The distinction taken above by Blackstone did not prevent his saying in his Commentaries that under-officers are servants of the sheriff;⁴ and in *Woodgate v. Knatchbull*,⁵ Ashurst, J., after citing the words of Lord Mansfield, adds, “This holds, indeed, in most instances with regard to servants in general;” and Blackstone says the same thing in a passage to be quoted hereafter.

Having thus followed down the fiction of identity with regard to one class of servants, I must now return once more to Lord Holt’s time. In *Boson v. Sandford*,⁶ Eyres, J., says that the master of a ship is no more than a servant, “the power which he hath is by the civil law, Hob. III, and it is plain the act or default of the servant shall charge the owner.” Again, in *Turberville v. Stampe*,⁷ Lord Holt, after beginning according to the Roman law that “if my servant throws dirt into the highway I am indictable,” continues, “So in this case, if the defendant’s servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet the master shall be liable to an action for damages done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master’s benefit.” This is the first of a series of cases decided by Lord Holt⁸ which are the usual starting-point of modern decisions, and it will be found to be the chief authority

¹ *Lane v. Cotton*, 1 Salk. 17, 18; s. c. 1 Ld. Raym. 646, Com. 100 (P. 12 W. III.).

² *Saunderson v. Baker*, 3 Wilson, 309 s. c. 2 Wm. Bl. 832; (T. 12 G. III. 1772).

³ *Ackworth v. Kempe*, Douglas, 40, 42 (M. 19 G. III. 1778).

⁴ 1 Bl. Comm. 345, 346.

⁵ 2 T. R. 148, 154 (1787).

⁶ 1 Shower, 101, 107 (M. 2 W. III.).

⁷ 1 Ld. Raym. 264 (M. 9 W. III.); s. c. 3 id. 250, Carthew, 425, Com. 32, 1 Salk. 13, Skinner, 681, 12 Mod. 151, Comb. 459, Holt, 9.

⁸ *Jones v. Hart*, 2 Salk. 441; s. c. 1 Ld. Raym. 738, 739 (M. 10 W. III.); *Middleton v. Fowler*, 1 Salk. 282 (M. 10 W. III.); *Hern v. Nichols*, 1 Salk. 289.

relied on by cases which have become leading in their turn.¹ It therefore is interesting to note that it only applied the principles of *Beaulieu v. Finglam*, in the Year Book 2 Henry IV., to a fire outside the house, that the illustration taken from the Roman law shows that Lord Holt was thinking of the responsibility of a *paterfamilias*, and that in another case within three years² he made use of the fiction of identity.

I may add, by way of confirmation, that Blackstone, in his Commentaries, after comparing the liability of the master who "hath the superintendence and charge of all his household" if any of his family cast anything out of his house into the street, with that of the Roman *paterfamilias*,³ further observes that the "master may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself."⁴

There is another line of cases which affords striking and independent evidence that the law of master and servant is a survival from slavery or other institution of like effect for the present purpose, and that the identification of the two parties was carried out in some cases to its logical result. If a servant, although a freeman, was treated for the purposes of the relation as if he were a slave who only sustained the *persona* of his master, it followed that when the master was liable, the servant was not. There seems to have been a willingness at one time to accept the conclusion. It was said under James and Charles I. that the sheriff only was liable if an under-sheriff made a false return, "for the law doth not take notice of him."⁵ So it was held in the latter reign that case does not lie against husband and wife for negligently keeping their fire in their house, "because this action lies on the . . . custom . . . against *patrem familias* and not against a servant or a *feme covert* who is in the nature of a servant.⁶ So

¹ *Brucker v. Fromont*, 6 T. R. 659; *M'Manus v. Crickett*, 1 East, 106; *Patten v. Rea*, 2 C. B. n. s. 606 (1857).

² *Lane v. Cotton*, 1 Salk. 17, 18.

³ See also Noy's Maxims, c. 44.

⁴ Bl. Comm. 431, 432.

⁵ *Cremer & Tookley's Case*, Godbolt, 385, 389 (Jac. I.); *Lacock's Case*, Latch, 187 (H. 2 Car. I.).

⁶ *Shelley & Burr*, 1 Roll. Abr. 2, pl. 7 (M. 1 Car. I.). Cf. 1 Bl. Comm. 431; Com. Dig., *Action on the case for negligence*, A. C.

Rolle says that "if the servant of an innkeeper sells wine which is corrupt, knowing this, action of deceit lies not against the servant, for he did this only as servant."¹ So as to an attorney maliciously acting in a case where he knew there was no cause of action. "For that what he does is only as servant to another, and in the way of his calling and profession."²

Later this was cut down by Lord Holt to this rule that a servant is not liable for a neglect (*i.e.*, a nonfeasance), "for they must consider him only as a servant;" "but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer."³ That is to say, although it is contrary to theory to allow a servant to be sued for conduct in his capacity as such, he cannot rid himself of his responsibility as a freeman, and may be sued as a free wrong-doer. This, of course, is the law to-day.⁴ Yet as late as Blackstone's Commentaries it was said that "if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant."⁵

I think I now have traced sufficiently the history of agency in torts. The evidence satisfies me that the common law has started from the *patria potestas* and the *frihborh*, — whether following or simply helped by the Roman law, it does not matter, — and that it has worked itself out to its limits through the formula of identity. It is true that liability for another as master or principal is not confined to family relations; but I have shown partly, and shall complete the proof later, that the whole doctrine has been worked out in terms of master and servant and on the analogies which those terms suggested.

O. W. Holmes, Jr.

[To be continued.]

¹ Roll. Abr. 95 (T.), citing no authority, and adding, "Contra, 9 Hen. VI. 53 b." The contradiction is doubtful.

² Anon., 1 Mod. 209, 210 (H. 27 & 28 Car. II.). Cf. Barker *v.* Braham, 2 W. Bl. 866, 869.

³ Lane *v.* Cotton, 12 Mod. 472, 488, T. 13 W. III. Cf Mors. *v.* Slew, 3 Keble, 135 (23 & 24 Car. II. 1671, 1672); also Mires *v.* Solebay, 2 Mod. 242, 244 (T. 29 Car. II.), for an exception by Scroggs, C. J.

⁴ Sands *v.* Childs, 3 Lev. 351, 352; Perkins *v.* Smith, 3 Wilson, 328 (1752).

⁵ 1 Bl. Comm. 431; Bac. Abr., *Master & Servant*, K. It is enough simply to refer to the law as to the liability of married women.

THE TRUE MEANING OF THE TERM "LIBERTY" IN THOSE CLAUSES IN THE FEDERAL AND STATE CONSTITUTIONS WHICH PROTECT "LIFE, LIB- ERTY, AND PROPERTY."

IF there is one truth which, more than another, should be constantly borne in mind by one whose object is to ascertain the true meaning of any part of the law of our American constitutions, it is that that law is not a manufacture, but a growth, and that it is, therefore, impossible thoroughly to comprehend its true scope and meaning, without at least some knowledge of its history and development. In this respect, English and American constitutional law differs widely from that of France, for example, which is substantially nothing more than an attempt to establish a system of government on entirely new and theoretical principles, artistic in form, but without any very deep basis in the history and habits of the people. Such law, while it is the source and "garantie" of fundamental rights, is in no proper sense a consequence or generalization of rights existing independently, and if it should be abolished, the rights which it guarantees would disappear with it. The English Constitution, on the other hand, so far from being a work of modern art, a manufacture, is the result of centuries of bloodshed and strife, during which the "freemen" of England gradually secured their fundamental rights in the law courts, and established limitations of the regal power. In this view it is rather a result than a cause. It exists as a consequence or confirmation of the rights which it represents, and unless those

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rights had been independently secured, the English Constitution could never have existed. In other words, it is part and parcel of the law of the land, a generalization of common-law rights, the natural outgrowth of the customs of the people. And so is it also with our American constitutions. They are historical instruments, the possessions of a people with a legal history beginning, not with the Declaration of Independence, but with that of their English brethren. They are not the beginning, but the end; for they represent the last stage in a series of changes, the great landmarks of which are the Magna Charta, the Petition of Right the Habeas Corpus Act, and the Bill of Rights.

It is obvious, therefore, that one who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the constitution.¹ It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties,—at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation.

It is not within the scope of this essay to discuss at any length

¹ "The members of the convention unquestionably used the words they inserted in the constitution in the same sense in which they used them in their debates. It is their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not use the word 'imports,' when they inserted it in the constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this Court, we are at liberty to give old words new meanings when we find them in the constitution, there is no power which may not, by this mode of construction, be conferred on the general government, and denied to the state." — Chief Justice Taney in the Passenger Cases, 7 How. 478.

the nature and meaning of liberty, as that term is used in a broad and general sense to denote the great object of all free governments, — as it is used, for example, in the preamble of the Constitution of the United States. There are, however, a few general principles which it will be well to notice at this point.

Liberty, or civil liberty, as it is often called, has been defined by a hundred eminent writers, one of whom has remarked that "most of these definitions are not worthy of notice." As the term is used by philosophical writers, it does not appear to have any very definite meaning. As used by jurists, it is more capable of definition, because it signifies not so much a theory as a condition, not so much an ethical conception as a concrete existence. In this sense it is defined by Blackstone to be the "liberty of a member of society," and "no other than natural liberty so far restrained by human laws (and no farther), as is necessary and expedient for the general advantage of the public." With "natural liberty," or, as Cicero phrased it, "the power of living as thou willest," writers who are concerned with facts have nothing to do. Such persons deal only with liberty as it does or may exist, that is, in a state of society and in a body politic. A state of nature is a fiction. In this view the term is obviously a relative one, and it is, accordingly, proper to speak of modern and ancient, of Pagan and Christian, of English, of French, and of American liberty. Each of these systems has peculiar features, but they are all alike in one respect, in that they each and all represent the number and kind of important individual rights which have been secured in the social state under different forms of government. They all differ, in that no two of them afford precisely the same degree of right or liberty to those living under them. In England and the United States the number of rights and remedies which have been secured is very large. In Russia it is very small. Consequently, it is correct to say that Anglican liberty has reached a very high stage of development, while Russian liberty is, if the term were used in a more ethical sense, hardly worthy of the name. We are apt to connect the term with the particular form of government under which we enjoy that for which the term stands. So it was with the ancients, — the Greeks and Romans, — who identified it with a republican form of government. So also Americans are apt to connect it with the same form of government, as represented by the Constitution of the United States.

At bottom, however, the word "liberty," used in its broadest and most general sense, means and includes all those great rights, remedies, and guarantees which a human being has in a given state of society or under a given government, and that is the way it was used by our ancestors, who entitled their bill of rights a "body of liberties," and by Blackstone, in his chapter on the Absolute Rights of Individuals.¹ Taken in this sense, as being synonymous with civil or social rights, as distinguished from "natural" rights, American liberty includes the rights of life; of freedom of the person, of speech, and of the press; of religious freedom; of petition; of discussion; of marriage; of taking part in the government, and many others. All such rights are—with certain limitations, which make them truly social or civil rights, and apart from which the above terms cannot be understood—enjoyed in this country, as a matter of fact, whether or not they are all declared in our constitutional law. The question with which we are at present concerned, however, is the latter, or rather, is the question as to how many of the above-mentioned rights are included under a particular term in a particular clause in our most fundamental law.

In the Federal Constitution and in the constitutions of at least twenty-eight of our States there are clauses which in substance declare that no person shall be deprived of "life, liberty, or property (sometimes 'estate'), but by the judgment of his peers or the law of the land." In some constitutions the same rights are first declared in the ancient terms of the prototype of these clauses (to be noticed later), and are then summarized as above; and in some we find instead of "judgment of his peers or law of the land," the expression "due course (or 'process') of law;" but it is well settled that "due process of law" and "law of the land" are identical in meaning,² and the other variations are not important, because they do not affect the identity or history of the clause. A somewhat similar combination of terms occurs in other places in several of our constitutions, where perhaps the term "liberty" is used in a different sense.³ At present, however, we are concerned with it as it is used in this

¹ See also Lieber on Civil Liberty.

² 1 Cooley's Blackstone, 135, n.

³ See, for example, the Constitution of Massachusetts, which, following the Declaration of Independence, declares that all men have natural rights to life, liberty, and the pursuit of happiness.

peculiar connection, namely, in those clauses which forbid the taking of the three liberties in question unless by due process of law or the law of the land, unless, as Webster has so well expressed it, "by the general law, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." In this connection we shall perhaps find that the term "liberty" is fairly susceptible of a somewhat narrower construction than when used collectively to denote all those rights of which, generally speaking, no man ought to be deprived under any circumstances whatever; to denote, that is, an ideal of government. In this present connection the deprivation of the right named is contemplated as a necessary and usual thing. Indeed, it is worth noticing that in this connection the word and clause with which we are dealing are in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials, with the privileges of the accused, with a process in which the whole question is whether the person concerned shall be deprived of one or the other of certain rights; that is, of life, or *personal* liberty, or property as a penalty for crime; and it is declared that he shall not, without due process of law. *A priori*, therefore, it would seem that in this connection the term is not used in its broadest sense to denote all civil rights, but, like the terms "life" and "property," to denote one particular kind of civil right, of which the law is accustomed to deprive persons by way of punishment.

The clause in question has a definite and a most ancient history. It is of Teutonic origin, and Professor Stubbs states that the very formula here used is probably adopted from the laws of the "Franconian and Saxon Cæsars."¹ At any rate we find it in almost precisely the same form in which it has been incorporated into many of our American constitutions at the beginning of the thirteenth century in the Magna Charta of King John of England.² That century comprises at once the gloomiest and the most auspicious period of English history. During that century the English people were oppressed by a foreign and conquering race, were ruled by two of the worst kings that ever ascended the

¹ Constitutional History of England, vol. I, p. 577.

² Stubbs' Select Charters, 301.

English throne, and were in large numbers reduced to a condition of slavery. Yet during that same period the foundations of the English parliament, the English constitution, and the science of the English common law were laid. On June 15, 1215, King John, at the point of the sword, was compelled by the English barons to affix his seal to the "Great Charter of English Liberties," — a document upon which the unstinted praise of historians of every school and stamp has ever since been lavished. In one aspect the Magna Charta represents an end and consummation, in another a beginning. It was, for the most part, a compilation of the ancient customs of the realm,¹ or the laws of King Edward the Confessor as they existed before the Norman conquest. On the other hand it was the first great declaration of the rights of the new nation, the various elements of which several causes had combined to unite and consolidate, and from this time forth the constant demand of the people is for a confirmation, not of the "Leges Edwardi," but of the Magna Charta. It was, according to Lord Coke, confirmed no less than thirty-two times by subsequent monarchs. During the long reign of Henry III. the rights which had been wrested from King John were not only preserved, but also increased. During that of Edward I., who attempted to govern arbitrarily, it was the same. One remedial statute after another was passed, until finally every Englishman came to regard the Magna Charta and its confirmations as his birthright. We are told by Hallam that it is doubtful whether there are any essential privileges of Englishmen, "any fundamental securities against arbitrary power, so far as they depend upon positive institution, which may not be traced to the time of the Plantagenets. The same author has characterized the Great Charter as "still the keystone of English liberty. All that has since been obtained is little more than confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy."

It should be noticed, however, that the main object of those who did most to obtain the charter was to secure their own rights, not those of others. At that time the barons themselves were really the chief oppressors of the people. The king did all he could in that direction; but he was one, the barons many.

¹ Blackstone's Law Tracts, p. xii.

The king oppressed his barons, and they oppressed the people. The kind of oppression to which the barons were subjected by the king was, moreover, very different from that exercised by the former on the people. It consisted, mainly, of the hardships incident to the feudal system, such as wardship and marriage, aids and escuage. But the wrongs suffered by the people at the hands of the barons were far more intolerable. They were despoiled of their property, were taken and imprisoned in the castles of the barons in order to extort ransoms, and were even put to death without any pretence or process of law. The chronicles of that period afford evidence of systematic outrages practised by the barons on the people for which it would be difficult to find a parallel in English history. This has not been sufficiently borne in mind by those historians who have eulogized the English barons for their great solicitude concerning the interests of the people, for their generosity in caring for the interests of the people as well as their own, and for their foresight in establishing such far-reaching and eternal principles of liberty. The truth seems to be, not only that the charter was obtained chiefly through the efforts of the barons, but also that it was intended, first of all, for their protection. The bulk of it relates to feudal matters, applied only to those who held land by military tenure, and therefore affected the mass of the people only indirectly. It has been suggested that those articles which do include the people, and which are of a fundamental character, were inserted at the instance of the king. Whether or not such is the truth, however, the Great Charter did contain at least one provision which included all free-men, protected them against all persons, and which, if enforced, would forever secure to them their most fundamental rights. Moreover,—and this is the point especially to be noticed,—that article was intended rather to afford a practical remedy for cruel and intolerable invasions of certain elementary rights than to announce theoretical principles of right for future ages,—or even for themselves,—or to establish a great principle of what we of this century are pleased to call "constitutional" law.¹ Nor did it declare it to be self-evident "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This is worth observing, because it throws a strong light

¹ Macaulay's History of England, vol. I, ch. I.

on the article of which our "life, liberty, and property" clauses are either copies or slight variations.

The provision referred to is, of course, the thirty-ninth article of the Great Charter. It declares that "nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."¹ No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed; nor will we pass upon him, nor send upon him,² unless by the legal judgment of his peers, or by the law of the land. In the confirmatory statute of 9 Henry III., which is the form of the Great Charter found in the Statutes at Large, and is therefore part of the existing law of England, the above article is slightly enlarged. After the word "disseized" we find "of his freehold, or liberties, or free customs" ("de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis"),³ — an addition obviously intended to explain the right of property which the word "disseized" represents and declares. In another statute, passed in the fifth year of Edward III., the same article is rendered as follows: "No man shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seized into the king's hands, against the form of the Great Charter and the law of the land," — a clear declaration of the rights of personal liberty, life, and property. In 25 Ed. III. Statute 5, chapter 4, we find a more extended reading: "None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer and forejudged of the same by due course of law." Finally in 28 Ed. III., c. 3, the same declaration of rights is put still more clearly as follows: "No man, of whatever estate or condition that he be, shall be put out of land

¹ Stubbs' Select Charters, 301.

² That is, send others to pass upon, or condemn him; ² Institute, 54.

³ "Libertatibus" is evidently used here in the technical sense, meaning a privilege of an exclusive nature — a franchise. "Liberis consuetudinibus" means simply customary rights.

or tenement, nor taken nor imprisoned, nor put to death, without being brought in answer by due process of law."¹

The last four enactments are simply confirmations of the thirty-ninth article of the original charter, just as that article may be said to be a confirmation of the common law as it stood in 1215.² The rights set forth were not conceived of for the first time in 1215. They were rights which free Englishmen had always claimed, and theoretically had always possessed under the common law. The importance of the thirty-ninth article of the Magna Charta is, that it was almost the first clear and perfect publication of those rights, and that after it the mass of the people came to know more thoroughly and more universally, precisely what their rights were in theory, and so were able to make a harder fight for them in practice. In short, the article was a plain, popular statement of the most elementary rights. What, then, were those rights?³ In the original clause and in all its confirmations the general classification is the same, and, expressed in more modern phraseology, is simply life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property.⁴ In 1215 the expression "personal liberty" was not in use, but the idea, or better,—considering the condition of England at the time,—the ideal, was not only known, but, as we see, was set up in the above series of enactments; and the terms employed to express it were sufficiently plain: "No freeman shall be taken or imprisoned." Could any words more clearly express what we of this century intend when we talk about personal liberty, or about the great Habeas Corpus principle of Anglican liberty? It would seem not. It would seem, indeed, that the words which we should naturally

¹ For copies or confirmations of this article of Magna Charta by the early American Colonists see the Massachusetts "Body of Liberties," of 1641, and the "General Fundamentals" of the Plymouth Colony, 1 Hazard's State Papers, 408.

² Coke's Inst., proem; 1 Blackstone's Com's, 128.

³ "But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. 'No freeman shall be taken or imprisoned,' etc. It is obvious that these words, interpreted by an honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of John's Charter, it must have been a clear principle that no man can be detained in prison without trial." Hallam's Middle Ages, 423.

⁴ 4 Blackstone's Com's, 424.

use to-day to explain what is meant by personal freedom are the precise equivalents of the plain, simple Latin terms of that age: "Nullus liber homo capiatur vel imprisonetur." These words were, moreover, employed in the thirty-ninth article to express an idea which was just as dear to the men of that time as it is to us, remote as was the prospect of its complete realization in 1215. When they drew the famous thirty-ninth article that right was put first; and Lord Coke remarks, — in his commentaries on the article, where he points out that the evils from the laws of the land are to protect the subject, are recited in the order in which they most affect him, — that "this hath first place, because the liberty of a man's person is more precious to him than everything else that it is mentioned, and therefore with great reason should a man by law be relieved in that respect, if wronged."¹ Coke then discusses the meaning of the word "disseized," which he finds to include several varieties of rights, all of which may be included under the term "property," — which, however, does not occur in the Magna Charta or in any of its confirmations. According to Coke, this right is classified after that of personal liberty, because less sacred. Nevertheless, in the statute 28 Ed. III. c. 3, cited above, which is a confirmation of the thirty-ninth article in the original charter, the order of rights in the latter is reversed, property coming first, then personal liberty, then life. It seems, however, that no great importance is to be attached to the arrangement. The essential point is that all the enactments cited — to which others might be added — declare three great fundamental rights by prohibiting the doing of certain acts. Those rights are, perhaps, the most elementary and important rights conceivable, and are the ones with the development of which English constitutional history is chiefly concerned. They were brought together, and for the first time authoritatively and publicly announced to Englishmen as Englishmen in the thirty-ninth article of the Great Charter.

At what period the rights in question took on their present nomenclature and began to be termed the rights of "life, liberty, and property" it is impossible to say with any precision. The terms themselves are probably as old as the language. It cannot be said that they are fortunate ones in this particular connection and combination, because their meaning is vague and uncertain

¹ Second Institute, §4.

without some historical explanation. Perhaps such uncertainty is a necessary evil in all instruments which, like American bills of rights, represent a long period of development. The terms used in the original article are much more definite, and in some of our constitutions have been copied literally, with the words "life, liberty, and property" added by way of summary, and, as it seems, by way of supererogation.¹ We have noticed that the term "liberty," generally in the plural number, was formerly used to denote a right or privilege. Thus the Magna Charta itself was entitled the "Charta Libertatum." We have also noticed that the expression "civil liberty" is, in the same sense, simply a collective for all the rights, political, religious, and civil (using the word "civil" in the narrow and rather loose sense which it has recently acquired in this country), which a person has in a given social body, that is, under a given government. The term was formerly used in still another way, to denote, not any right or privilege, but an exclusive right or a franchise, and that is probably the sense in which it was used in the thirty-ninth article of Magna Charta, as confirmed by 9 Hen. III. c. 29. In all these cases, however, the term was not used in connection with the fundamental rights of life and property to express a third great right, as is the case in our American constitutions, and in the latter it must, therefore, be held to have a different meaning. In them it is not used to denote any and all rights, or to denote a right vested exclusively in one person, but to denote a particular kind of right to which every person is entitled, unless it is taken away by due process of law. It is used, in other words, just as the terms "life" and "property" are used, each to express a special kind of right. It is as unreasonable to say that "liberty," in this connection, includes all civil rights, as it is to say that the term "life" includes them, or that the term "property" includes them. If it did, it would include life and property, and the clause reading, "no person shall be deprived of life, all his rights, or property," would be an absurdity on its face. The fact is that each of these terms has a peculiar and definite meaning, and it seems clear, on the whole, considering the history of the clause, that the term in question means personal liberty, or freedom of the person from restraint. Personal liberty was a common-law right in England in 1215, and long before; it was one of the great rights declared in the thirty-ninth article of the

¹ See, for example, the constitutions of Massachusetts, New Hampshire, and Maryland.

Great Charter; it was insisted upon in all the confirmations of that article, and is there always found in connection with the rights of life and property; its infringement was the chief complaint in the Petition of Right of 1627, and the Habeas Corpus Act of 1679 was passed solely to secure it against usurpation. Altogether, it may be said that the history of the growth and development of the right of personal liberty is the main element in the history of early English constitutional law, that the idea of personal liberty pervades the history of the Anglo-Saxon race, and that it is, therefore, not surprising to find it classified with the rights of life and property as one of the three greatest civil "liberties."

It may, however, be contended that although the term "liberty" is not used in the clauses under discussion in its broadest sense to include all the rights one has in a body politic, it does include other great and important rights besides that of personal liberty, as, for example, religious liberty, liberty of speech and of press, liberty to bear arms, of petition and discussion, liberty to obtain justice in the courts, and many others, all of which are to-day regarded as fundamental rights in this country.¹ It may be argued, in other words, that the term "liberty" is a broader one than the terms used in Magna Charta, and may well be interpreted to include other rights besides that of personal freedom, for the reason that it was probably intended so to do by the framers of our constitutions. There are several answers to this argument. In the first place, the clauses in our American constitutions are, as we have seen, mere copies of the thirty-ninth article of Magna Charta, which knows nothing of such rights as the above. In the second place, the term "liberty," while it was not used in the thirty-ninth article, was used in its present connection with the terms "life" and "property" long before the framing of our American constitutions, and when so used meant simply personal liberty. It would, therefore, naturally be used by the framers of our constitutions in that sense. To establish this it is only necessary to refer to Blackstone. In one place Blackstone remarks: "The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and

¹ See Judge Cooley's discussion of the fourteenth amendment in the appendix of his edition of Story on the Constitution. See also his discussion of "Civil Rights" in the "Principles of Constitutional Law."

property unless declared to be forfeited by the judgment of his peers or the law of the land," referring, of course, to the thirty-ninth article. In another place he discusses the subject more at length, and after defining the absolute rights of individuals, "which are usually called their liberties," to be "those rights which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it," he goes on to enumerate them: "These rights may be reduced to three principal or primary articles: the right of personal security" (under which he includes life, limb, health, and reputation, the same rights which Coke and other commentators on the thirty-ninth article include under the terms "aliquo modo destruatur," and which may fairly be included under the term "life" in our constitutions), "the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will but by an infringement of one or the other of these importants rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense."¹ Blackstone defines personal liberty to be the "power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law," and he observes that it is perhaps the most important of all civil rights. He means by personal liberty simply freedom from restraint of the person. It is instructive to note that Blackstone, in discussing each "absolute" right, points out that it is declared and secured by the famous article of the Great Charter. He cites the words "nullus liber homo aliquo modo destruatur" as the constitutional security for the right of life or personal security; the words "capiatur vel imprisonetur" for the right of personal liberty, and the words "dissaisiatur de libero tenemento" for the right of private property. It is evident, therefore, that his classification of fundamental rights under the terms "life," "liberty," and "property," like that of all other commentators, is derived from the thirty-ninth article. It is evident, also, that he had no conception of religious liberty, liberty of press and speech, or political liberty (meaning thereby the right to take part in the government, *e. g.*, the right to vote) as absolute

¹ 1 Bl. Com's, chapter on "Absolute Rights of Persons."

rights of individuals. They are not mentioned in his discussion of the subject. He does, indeed, name certain other important individual rights besides those of life, personal freedom, and property, such as the right of petition, of securing justice in the courts, and of bearing arms; but he says that these "serve principally as networks or barriers to protect and maintain inviolate the three great and primary rights."

In "Care's English Liberties," a collection of important English Charters which had a wide circulation in the American colonies, the fifth edition of which was published in Boston in 1721, we find the same classification of rights in the same terms, and in every case the term "liberty" is explained to mean freedom of the person from restraint. For example, in his comment on the Habeas Corpus Act the author says:—

There are three things which the law of England (which is a law of mercy) principally regards and taketh care of, viz., life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person; for indeed, what is imprisonment but a kind of civil death? Therefore, saith Fortescue, cap. 42, the laws of England do, in all cases, favor liberty. The writ of Habeas Corpus is a remedy given by the common law, for such as were unlawfully¹ detained in custody, to procure their liberty.¹

Chancellor Kent made precisely the same enumeration of fundamental rights, with religious liberty added as a distinct and separate right.² There is no suggestion of its being included in the clauses in question. Indeed, religious freedom is a modern idea, and may be regarded as one of the contributions of this country to civil liberty. It was totally suppressed and unrecognized in England in the seventeenth century.³ In theory it does not exist in England to-day. Any person who publishes a denial of the truth of the Christian religion, or of the existence of God, commits a blasphemous libel, and is, on the existing law, liable to imprisonment. It matters not whether the terms of the publication are decent or otherwise. So, a denial of the truth of Christianity, or of the Scriptures, by any person who has been educated as a Christian in England, is a criminal offence, entailing severe punish-

¹ Care's English Liberties (Ed. 1721), p. 185.

² Kent's Com's, vol. 2, chap. I.

³ Hume's History of England, vol. vi. 158, 165.

ment.¹ Even in this country religious liberty has not always flourished. In fact all the early colonies, except Rhode Island, absolutely denied it, and it cannot be said to have become generally established as a right until well into the last century. And so it is with what we call "liberty of the press," which means nothing more than liberty to publish any statement without the permission of a licenser, or freedom from censorship. This right is also of very recent origin. It is not mentioned in the Petition of Right (1627), nor in the Bill of Rights (1689), of so little importance did it seem to those engaged in redressing the grievances of that time in England.² In the colonies the feeling was the same. In 1671 Governor Berkeley, of Virginia, "thanked God that there were no free schools or printing; and I hope we shall not have them these hundred years; for learning hath brought disobedience and heresy into the world, and printing hath divulged them. God keep us from both."³ He was speaking of the condition of the colonies in reply to English Commissioners. In 1683, when Governor Dongon was sent out as governor of New York, he was expressly directed not to allow any printing.⁴ In Massachusetts the publication even of State papers did not become free until 1719.⁵ Yet at this time, as always, the colonists most strenuously asserted their rights to life, liberty, and property; and Chalmers, in his Colonial Annals, declares that they are "assuredly entitled to the same liberties which are enjoyed by those whom they had left within the realms." "They were entitled to personal security, to private property, and, what is of most importance of all, to personal liberty."⁶ On the whole, therefore, one is fully justified in saying that liberty of press and religion, and of speech, were unknown and unclaimed as rights, not only when the thirty-ninth article of Magna Charta was formed, but also centuries later when the terms of that article became paraphrased or consolidated into the more modern expression, "life, liberty, and property." That phrase was probably in use

¹ 9 & 10 Will. III. c. 35; 53 Geo. III. c. 160; Dicey on the "Law of the Constitution," 257.

² It was not fully obtained in England until 1694. See 2 Cooley's Blackstone, 135, note (a).

³ Chalmers' Annals, 328.

⁴ 2 Hildreth's History, 77.

⁵ 2 Hildreth, 298.

⁶ Chalmers' Annals, 678.

long before the eighteenth century, and when used could not have included the above rights because they did not exist at all, or were not deemed important. Such being the case, and the terms having taken on a fixed meaning, it is reasonable to suppose that the makers of our constitutions used them with that meaning, just as Blackstone did when he employed them to denote the three great absolute rights of individuals.

In regard to such "liberties" as those of petition and discussion, of trial by jury, of Habeas Corpus, of bearing arms for defence, of taking part in the government, and many others, important as such rights are, they cannot be said to be fundamental in the sense that life, personal liberty, and property are fundamental rights. Strictly speaking, they are not substantial rights at all. As ends in themselves they are of no value. They are what Blackstone terms "subordinate" rights. In other words, they are really the remedies or means which must often be employed in order fully to obtain and enjoy the real and substantial liberties. If the term "liberty" is held to mean civil liberty in its broad sense, all such rights must undoubtedly be included within it; but so must the rights of life and of property. It is only fair to assume that when the term was used by the framers of our constitutions, it was intended by them to have a definite meaning. As has been indicated, it had always had a definite meaning in the past. It is barely possible that they intended it to comprise all the liberties a person was to have under the form of government which they were about to establish. But if such was their intention, why did they use the term in its ancient connection, with two other terms which had a historical meaning, but which, upon that theory, would be entirely superfluous and meaningless? If they intended it to mean civil liberty, and to include such rights as those of marriage, of education, and of employment, it would, of course, necessarily include the more fundamental rights of life and property, and the enumeration of the latter would be useless. If their intention was as supposed, it would surely have been more natural for them to have inserted a clause reading: "No person shall be deprived of any of his civil rights or liberties unless by due process of law." Such a clause was inserted in the constitution of New York, article I, section I of which provides that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to

any citizen thereof unless by the law of the land or the judgment of his peers." And yet another section of the same article, in providing for the rights of criminals, declares that "no person shall be subject to be twice put in jeopardy for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law." If the term "liberty" in the last clause has the meaning sometimes suggested, the first clause is entirely superfluous; and yet it is a canon of the interpretation of solemn instruments like constitutions, that a clause is not to be so construed as to render another clause entirely superfluous without very strong evidence.

Moreover, the important rights which, if the term is used in the broad sense, must be included within it, are in all our constitutions specially provided for in separate, and often elaborate clauses. Thus the Federal, and almost all the State constitutions, provide in different terms for freedom of religion, of speech, and of press, for the right of trial by jury, of bearing arms, and the right of petition. So also constitutional protection is afforded against unreasonable searches and seizures, against quartering soldiers in private houses, and against excessive punishments. All these are certainly civil rights, and a part of one's liberty under American government. Yet it seems to the writer that the mere fact that these — which may be described as rights of the second degree of magnitude — are provided for in separate clauses is a fair and strong argument to show that they were not intended to be included in a clause of a very different nature, which enumerates and protects in historical language those great liberties which have, from time unknown, been deemed the most fundamental rights of a freeman. That such a clause includes all rights, great and small alike, seems to the writer an untenable interpretation. And yet if it includes any besides the right of personal liberty, there seems to be no reason why it should not include all.

Finally, there is one other fact, already adverted to, in the nature of intrinsic evidence, which is worth noticing. If "liberty" includes all great civil rights, it must include such rights as religious liberty, trial by jury, and liberty of press. The clause being interpreted would then read: "No person shall be deprived of his religious liberty, etc., unless by due process of law." But the supreme, fundamental law, as declared by our constitutions, is that a

person shall *never* be deprived of those rights, that they shall be inviolate and sacred forever. Therefore, how can such rights fairly be construed into a clause contained in a section dealing with the punishment of crime, a clause naming rights which are constantly taken away, which itself implies that they must always constantly be taken away, and which only stipulates that they shall be taken by due process of law? In other words, is it fair to suppose that the framers of our constitutions intended, first, to declare certain rights to be in every case and under all circumstances inviolable, and then to declare, or to imply, that the same rights might be taken away by due process of law? It would seem that such an intention cannot be imputed to them.

So much for the question considered entirely as one of principle. If the conclusion arrived at is correct, the term "liberty," as used in those clauses which protect "life, liberty, and property," unless taken by "due process of law," means nothing more or less than freedom of the person from restraint,—the great Habeas Corpus principle of Anglican liberty,—a right, the illegal invasion of which gives rise to an action of false arrest or imprisonment. It must be admitted that this view is not altogether supported by the adjudged cases. In fact, the precise view here maintained is repudiated by several decisions. On the other hand, as far as the present writer has been able to discover, the courts themselves have not yet arrived at any very definite conclusion regarding the scope of the term. There is some general discussion in the books about the origin and nature of the clause as a whole. There are volumes of discussion of the meaning of the phrase "due process of law." There is also some loose and indefinite talk about life, liberty, and property. When, however, one seeks to ascertain the precise signification of "due process of law," he will not get a more definite idea from the decisions than from the concise, but necessarily rather vague, definition of Webster, already cited; and when one examines the cases to learn the meaning of the terms "life," "liberty," and "property," although he may be informed of some of the rights which those terms do include, he gets little or no exact information regarding their precise scope—as to the rights which they do not include. This indefiniteness is particularly noticeable in some of the federal decisions.

The fifth amendment to the Federal Constitution, the object of which is to provide for prosecutions, trials, and punishments (we

have seen that the clauses in question are generally contained in such a section), declares, among other things, that "no person shall be deprived of life, liberty, or property without due process of law." This amendment, like most of the others, was aimed at the federal government only, and the writer has been unable to find a judicial construction of it which throws any light on the present question. The first section of the fourteenth amendment provides that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The amendments to the Federal Constitution constitute its bill of rights. The fourteenth amendment was the second of a series of three, the purpose of which was to secure to a recently emancipated race all the civil rights that the whole people enjoy, and to give it the protection of the general government in the enjoyment of such rights whenever they should be denied by the States or their agents. It did not add anything to the rights of one citizen against another citizen. Such rights were left to the legislation of the States.¹ The second clause of the amendment is, like corresponding clauses in the State constitutions, taken from Magna Charta, and there is no reason why it should receive a different interpretation. The first decision to put a construction on the fourteenth amendment was that in the Slaughter-House Cases, 16 Wall. 36. In 1869 the Legislature of Louisiana created a corporation called the Slaughter-House Company, which was empowered to maintain stock landings and slaughter-houses at a specified place near New Orleans, and all cattle brought to New Orleans for food were required to be kept and slaughtered at these houses, the company being authorized to demand a compensation for the use thereof. The exclusive privilege thus conferred was to continue for twenty-five years. Certain persons

¹ "It simply furnishes an additional security against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." U. S. v. Cruikshank, 92 U. S. 25.

engaged in butchering in New Orleans brought actions in the State courts to test the constitutionality of this act, and those actions were afterwards carried to the Supreme Court of the United States. It was there contended that the act violated the thirteenth and fourteenth amendments,—the former by creating an "involuntary servitude," the latter by depriving the plaintiffs of their "privileges and immunities" as citizens of the United States, of the "equal protection of the laws," and of property without process of law. The court sustained the act, overruling all the above objections. Three judges, however, filed dissenting opinions, and each had something to say about the meaning of the term "liberty."

Mr. Justice Bradley, in discussing the meaning of the terms "privileges and immunities," quotes the thirty-ninth article of Magna Charta, and then says:—

English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of Habeas Corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property. . . . The Declaration of Independence lays the foundation of our national existence upon the broad proposition "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." . . . Rights to life, liberty, and property are equivalent to life, liberty, and the pursuit of happiness.

Farther on, referring specially to the life, liberty, and property clause, the same learned judge says:—

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. This right of choice is a portion of their liberty; their occupation is their property.

Mr. Justice Swayne took a similar view:—

Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Property is everything which has an exchangeable value, and the right of property includes the right to dispose of it according to the will of the owner. Labor is property, and as such merits protection.

It is rather peculiar that Mr. Justice Bradley, after approving Blackstone's enumeration and definitions of absolute rights, should state that the right to choose an occupation is a part of one's liberty as that term is used in the clauses in question, and imply that Blackstone classifies the right of Habeas Corpus under the right of personal liberty as a distinct part thereof.¹ Blackstone's conception of the terms was more precise. The idea that one's labor is one's property is rather economic than legal, and indeed in another case a passage from Adam Smith's "Wealth of Nations" is the authority cited.

It is, however, to be observed that the court, while it did not much discuss the clause in question here, apparently took a view of it very different from that of the dissenting judges. It decided that a State can, in certain cases, grant a monopoly to a corporation. It asserted that this power is unrestrained by the thirteenth and fourteenth amendments, and that the privileges referred to in the latter are those of citizens of the United States as such. It clearly implied that the ordinary fundamental rights of all persons to hold property, to engage in trade, and all lawful occupations, are not among them. Finally it disposed of the life, liberty, and property clause in the following summary fashion: —

The argument has not been much pressed, in these cases, that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States. . . . And it is sufficient to say that under no construction of that provision that we have seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

¹ The right to be brought before a magistrate and have one's case examined is not the right of personal liberty any more than the right to a trial by jury is the right of life. It is simply "process of law."

The court did not, apparently, consider it even arguable that the restraint upon following their lawful calling was a deprivation of "liberty." Moreover, the decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the fourteenth amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term "liberty."

So also in *Bradwell v. The State*, 16 Wallace, 130, it was decided that a law of Illinois denying the females the right to practise law in that State violated no provision of the Federal Constitution, the plaintiff contending that it violated the fourteenth amendment. Here also the court seems to have decided, by implication, that the right to practise a lawful calling is not included in the life, liberty, and property clause. It expressly decided that it is not a privilege or immunity of a citizen of the United States. In *Walker v. Sauvinet*, 92 U. S. 90, the question was whether the right of trial by jury was secured by the fourteenth amendment. It was held that it was not, but there is no direct consideration of the term in question. In *Munn v. Illinois*, 94 U. S. 142, we find a direct statement on the point, although not in the opinion of the court. The question was as to whether a State legislature may fix the maximum of charges for the storage of grain in warehouses situated in large cities, without violating the fourteenth amendment. The court held that this could be done, that where property is devoted to a public use, the States may, in the exercise of the police power, to a certain extent control it, and that the fourteenth amendment cannot be supposed to interfere with the police power. Mr. Justice Field, in a dissenting opinion, contended that the act did violate the fourteenth amendment, and among other things said:—

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment.

Butchers' Union Company *v.* Crescent City Company, 111 U. S. 746, is another case where some of the judges insisted upon such a construction of the term as would include the right to follow any lawful occupation. The appellee in this case was the company to which the Legislature of Louisiana had, in 1869, granted the exclusive privileges for slaughter-houses which were sustained in the Slaughter-House Cases. The appellant company had received a grant of privileges of the same kind from the same State, in 1881, but had been restrained from exercising them by the lower courts. The Supreme Court now held that such privileges could be exercised by the appellants, that the power of a legislature to make an irrepealable contract did not extend to subjects affecting the public health and morals, so as to limit the future exercise of legislative power on those subjects, to the prejudice of the general welfare. In a concurring opinion Bradley, J. (with whom agreed Harlan and Woods, JJ.), who dissented in the Slaughter-House Cases, reasoned that the law creating the monopoly which was sustained in those cases abridged the "privileges" of the other citizens of New Orleans, which the fourteenth amendment was intended to protect, and then declared: —

But if it does not abridge the privileges of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And if a man's right to his calling is his property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans were deprived, by the law in question, of their property, as well as their liberty, without due process of law.

If "property" means pursuit of happiness, as the learned judge has before implied, it is difficult to perceive why there should be any distinction between a calling adopted and one not adopted. In either case one's "pursuit of happiness" may be interfered with by a prohibitive law. It is also difficult to distinguish liberty and property. If the latter has the meaning suggested, probably there is no distinction.

The above seem to be the only federal decisions which throw any light on this subject. In any view they are unsatisfactory. In no case does the opinion which stands as that of the court

discuss the present question, and while it does, in several cases, appear to proceed on the ground that the "life, liberty, and property" clauses do not include rights like that of pursuing any lawful occupation, it might just as well have rested on the ground that the acts in question were a fair exercise of the police power of the State, and so were due process of law. On the other hand, the opinions of the dissenting judges, so far as they concern this particular point, are not only of no authority as decisions, but are also somewhat too vague to be of much value in determining the true meaning of the term.

There are several cases decided in the Court of Appeals, of New York, in which views similar to those of the dissenting judges in the above cases were expressed. The first of these was *Bertholf v. O'Reilly*, 74 N. Y. 509. The remarks in that case, on the present question, were only by way of dictum, but they have been approved and enlarged upon in subsequent cases. The question was as to the validity of an act of the New York Legislature creating a cause of action in favor of a person injured by the act of an intoxicated person, against the owner of real property, whose only connection with the injury was that he leased the premises whereon the liquor causing the intoxication was sold. The defendant, a property owner, did not contend that the act was a violation of his "liberty." He argued (1) that it was an infringement of his right of property, and (2) that it violated another and distinct section of the New York Constitution,—already cited,—which declares that no member of the State shall be deprived of *any* of his rights unless, etc. The act was held a valid exercise of the police power, but the court took occasion to remark that "one may be deprived of his liberty in a constitutional sense without putting his person in confinement; the right to liberty includes the right to exercise one's faculties and to follow a lawful occupation for the support of life."

This view was followed in the case of *In re Jacobs*, 98 N. Y. 98, where an act prohibiting the manufacture of cigars in tenement-houses was held unconstitutional, as being an infringement of the rights of liberty and property, and as not being a proper exercise of the police power. The court says: —

So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country,

means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or occupation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed under the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection.

It is not clear whether the court had in mind the clause in the New York Constitution, protecting all rights, or that protecting simply life, liberty, and property. The defendant cited both clauses. Probably the court did not distinguish them.

People v. Marx, 99 N. Y. 377 (1885), is a similar case. Here a law prohibiting the manufacture and sale of oleomargarine was held void, as violating the clause protecting life, liberty, and property, and also that protecting any of the rights of a citizen of the State. The court says that it is now settled that "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit," and then repeats the statements in the other New York cases that the term "liberty" includes the right to be free in the enjoyment of all the faculties with which one has been endowed by his Creator.

People v. Gillson, 109 N. Y. 399 (1888), was decided on the same ground. A statute made it a misdemeanor for any person who sold food to give away therewith, as a part of the transaction of sale, any other thing as a premium, gift, etc. The court held the act void as infringing liberty and property, and said: —

The defendant here appeals for his protection to the clause in the constitution which provides that no person shall be deprived of his life, liberty, or property, without due process of law. The meaning of this provision in our State constitution has frequently been the subject of judicial investigation, and this court has had occasion very recently to discuss it. The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint of

the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

The last New York case in which the point has been touched upon is *People v. King*, 110 N. Y. 418, where the court remarked, *obiter*:—

It is not necessary at this day to enter into any argument to prove that the clause in the bill of rights is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense against unlawful invasion by the government, but also protects every essential incident to the enjoyment of those rights.

There is also a very recent decision by the Court of Appeals of West Virginia¹ in which similar expressions are used. An act of that State prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act. The court held such act void as being "an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him." The court cites with approval the passage in *People v. Gillson*, above quoted. Although, however, the opinion does apparently rest upon the ground that the act was an infringement of the plaintiff's liberty, the "life, liberty, and property" clause strictly so called is not mentioned at all. The court quotes an entirely different section of the constitution of West Virginia, namely, article 3, section 1, which declares, like the Declaration of Independence, that all men are born free and equal, and have the right to pursue happiness, etc. Such a clause may well be held to include all the rights which the laws of West Virginia afford. It is also noticeable that the act is held to be an invasion of the right of property, and that the expressions used by the minority of the Supreme Court of the United States in the Slaughter-House Cases are repeated. The court says: "The property which every man has in his own labor, as it is the original founda-

¹ *State v. Goodwill et al.*, 10 S. E. Rep. 285. For similar cases see *Godcharles v. Wigeman*, 113 Pa. St. 431, and *Hancock v. Yaden*, 23 N. E. Rep. 253. In the former case the act was declared "utterly unconstitutional and void" without further discussion.

tion of all other property, so it is the most sacred and inviolable." "The vocation of an employer, as well as that of his employee, is his property."

The writer has been unable to find any more satisfactory consideration of the subject than that represented by the above cases. As before remarked, the result of those cases is doubtful, their value small. They neither establish, nor much help to establish, the precise meaning of the term, and if they represent the existing law, the question is still an open one. All that can be said is that there is a tendency to give to the clause as a whole a wide scope, and to the term "liberty" a meaning at least sufficiently broad to include what are sometimes classified as "civil" rights, meaning thereby not all the rights of a citizen, not those of life and property, and not those great liberties which are commonly provided for in special clauses in our bills of rights, but simply freedom from restraint in the ordinary pursuits and avocations of the citizen. In the few cases in which there is anything like a clear and definite decision, the question before the court was whether the term included the right to pursue any lawful occupation in a lawful manner,—and it was decided that it did, that every person has the liberty to "exercise his faculties in all lawful ways." Whether, if the point should squarely come up, the courts would so interpret the term "liberty" as to render it prohibitive of any legislative invasion of the right of marriage, of education in the public schools, of resorting to any place of public amusement, and of receiving proper accommodation at the hands of innholders or common carriers, is not clear. The remarks of some of the judges would seem to indicate that result, and such rights are apparently often classified with the right to pursue any occupation, or to "exercise one's faculties," as "civil" rights. The cases in which there has been any discussion of such rights have arisen since the late war, and the question has always been as to the validity of statutes making certain discriminations in these matters between white and colored persons. These cases have always been decided with reference to that provision in the fourteenth amendment securing the "equal protection of the laws," and of course they naturally call for an interpretation of that clause rather than the one here in question.¹

As regards the tendency to give the clause a broad interpretation,

¹ Pomeroy on Constitutional Law, p. 256 *r-*.

and at the least to include within the term "liberty" the right to follow any lawful calling, natural and reasonable as such a construction may at first glance appear, it seems, upon examination, to have little real foundation either in history or principle. The use of the term "civil" to denote the ordinary substantive rights, other than life and property, which every citizen has, and constantly exercises in his daily life, is of recent origin, probably not extending back farther than the War of the Rebellion, and a construction of the term "liberty" making it coextensive with "civil rights" in that limited sense of the term "civil," seems to be unhistorical and arbitrary. One is obliged to ask why it should include thus much and no more. If it includes the right to pursue any lawful trade, why should it not include the right to worship in any lawful manner, to print or speak in any lawful manner, and to exercise one's political privileges in any lawful manner? Possibly, if the point should arise, it would be held to include all the above liberties, although the writer has not found any statements in the books to that effect. The reasons for supposing that the term should not be so interpreted have already been set forth.

Charles E. Shattuck.

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Editors *Harvard Law Review* :—

Your January issue announced that Vol. 4 of the Selden Society publications, by Professor Maitland, was in the press. I am sure that your readers will be interested in not a few of the *formulae* which the proofs are bringing to hand; for it should be stated that this volume will differ from the preceding volumes, *inter alia*, in being a collection of precedents. Professor Maitland is printing from MS. books of precedents dating in their earlier part as far back as about the year 1265.

In one of the earliest, a precedent is given of so interesting a character that I must beg the editors of THE REVIEW for space enough to print it, in advance of the publication of the volume in which it will appear. It is a precedent in a Court Baron (all these precedents are of Courts Baron) of what we should now speak of as a malicious interference with a contract, anticipating by six hundred years what the English judges struggled so much with, and some of them against, in the well-known cases of Lumley *v.* Gye, 2 El. & B. 216, and Bowen *v.* Hall, 6 Q. B. D. 333. The whole thing was, it seems, a matter of course to the lawyers of the thirteenth century. Perhaps, too, the judges in the well-contested case of Mogul Steamship Co. *v.* McGregor, 21 Q. B. D. 544, s. c. 23 Q. B. D. 598, would have found something of value in the old precedent.

The precedent is given in the translation by Professor Maitland, pp. 40, 41.

M. M. B.

OF DISTURBING A BARGAIN :—Sir Steward, William [Vintner] of Woodstock, who is here, complaineth of R[obert] Baker, who is there, that wrongfully he supplanted him of a ton of wine of a merchant of Southampton, Bernard Taney by name, which he [the plaintiff] bought of him [Bernard] for 36s. and gave [earnest] and found pledges to duly pay the said sum on a certain day without any delay; this done, came the said Robert and in despite of W[illiam], who is here, spake so much ill and villainy of him to the merchant and drove his own bar-

gain so that the merchant increased the price of the ton to 40s. payable at a certain day, and thus did he [Robert] raise the price by 4s.; and the said William hired a cart with four horses for a half-mark to carry the ton from Southampton to his house at Woodstock; and when he came to Southampton he found that owing to what Robert had said the merchant was now of another mind, that he would not let him [have the wine] and told him right out that he heard tell so much evil of him that he would give him no credit; and so [William] returned from the port with the cart that he had hired as empty as when he took it thither, and none the less had to pay for its hire on the day fixed for payment; so that wrongfully and without reason did he [Robert] speak evil of and procure evil for him [William] to his damage of 40s. and shame of 100s. If confess, etc.

Tort and force and all that to tort belongeth, defendeth R[obert], who is here, against William of Woodstock, who is there, and his damages of 40s. and shame of 100s. and every penny of it, both against him and against his suit and all that he surmiseth against him; and well he sheweth thee that never did he supplant him of the said ton or raise the price against him by 4s or any penny as he surmiseth; and of this he is ready to acquit himself in all such wise as this court shall award that acquit himself he ought. Fair friend Robert (saith the steward) this court awardeth that thou be at a law six-handed at the next [court], etc.

CAN A MURDERER ACQUIRE A TITLE BY HIS CRIME?—A decision which brings about a just result, but upon wrong grounds, is commonly mischievous as a precedent. A pertinent illustration of such mischief is to be found in *Shellenberger v. Ransom* (Nebraska, 1891), 47 N. W. R. 700, in which case *Riggs v. Palmer*, 115 N. Y. 506, was treated as a controlling authority. In the New York case a young man murdered his grandfather, in order to prevent a revocation of the latter's will, in which he, the grandson, was the principal beneficiary. Being convicted of the crime, and sentenced to imprisonment for a term of years, he still claimed the property as devisee. The majority of the court, however, decided in favor of the testator's heirs, treating the will as revoked by the crime of the devisee. Two judges, dissenting, were of opinion that the will was not revoked, and that the grandson should keep the property in spite of his crime.

It seems possible to agree with the dissenting judges, that there was no revocation of the will, and also to agree with the majority of the court, that the grandson could not retain the property. By a familiar equitable principle, one who acquires a title by fraud or other unconscionable conduct is not allowed to keep it for himself, but is treated as a constructive trustee for the benefit of the victim of his fraud, or, if he be dead, for his representatives. Accordingly, full effect might have been given to the will, and yet the devisee, as a constructive trustee, might have been compelled to surrender his ill-gotten title to the testator's heirs. In cases like *Riggs v. Palmer*, where the controversy is between the criminal and the representatives of his victim, the view here suggested and the view of the court may lead to a different mode of procedure; but they accomplish the same practical result. But directly opposite results are caused in cases where the controversy is between a *bona fide* purchaser from the criminal, and the representatives

of his victim. If no title passes from the deceased to the murderer, his purchaser gets none, however innocent. But if the murderer gets a title, although as a constructive trustee, an innocent purchaser from him will acquire a title free from the trust. This distinction was involved in *Shellenberger v. Ransom*.

A father murdered his daughter in order to inherit her property, and, four days later, sold the property to a third person. The court, reading into the statute of descent a disinheriting clause, as the majority of the court in *Riggs v. Palmer* had read into the Statute of Wills a revocation clause, decided that the daughter's property did not descend to the father, because of his crime, and consequently declined to consider the question of the purchaser's good faith, although this should have been the cardinal point of the case. It is believed that the so-called fusion of law and equity is largely responsible for such decisions as those under discussion. The advantages of vesting a court with both legal and equitable powers are not to be denied. But when the doctrines of equity are no longer administered in a separate court, it is all the more important not to lose sight of the fundamental distinction between law and equity,—a distinction as eternal as the difference between rights *in rem* and rights *in personam*.

WE recommend to the attention of all our readers Professor Langdell's annual report as Dean of the Harvard Law School.¹ It is now twenty years since the present system was introduced at the school by Professor Langdell, and the report presents a brief history of this period. We quote a few passages:—

"In 1869-70 there were no examinations either for admission to the school or for a degree; and those who received the degree of Bachelor of Laws at the close of that year were required to show only that they had paid the tuition fees for a year and a half. . . . On the other hand, all those who received a degree at the close of the year 1889-90 had passed three successive annual examinations, each upon a full year's work, thus making three years' work in all. All of them had been in the school two full years, and all but four of them had been in the school three full years. Moreover, all of them who were not graduates of colleges had passed an examination for admission, either in Latin or French, and also in Blackstone's Commentaries.

"In 1869-70 the teaching force of the school consisted of three professors. Now it consists of five full professors, one assistant professor, and three lecturers. . . .

"In 1869-70 the amount of instruction given was ten hours per week (sufficient only for a single class). In 1889-90 the amount of instruction was thirty-five and one-half hours per week, and the amount now given is forty hours per week.

"In 1869-70 the total number of students in the school was 156, of whom 99 were in the school only a part of the year. In 1889-90 the total number of the students in the school was 262, of whom all but 33 were in the school during the entire year. . . .

"Prior to 1870-71 the student was expected to acquire his knowledge of law by studying certain prescribed text-books or treatises, and

¹ Annual Reports of the President and Treasurer of Harvard College, 1889-90, Cambridge, Mass. Published by the University, 1891, pages 126-136.

the instruction given consisted of lectures upon these same text-books, — a mode of study and instruction which has become in this school a forgotten piece of antiquity. Now the student makes his own text-book, and the subjects as well of study as of instruction are those original materials of the law which constitute the stock-in-trade alike of the judge, the practising lawyer, and the teacher.

"In 1869-70 the library was so nearly a wreck that it required to be reconstructed almost from its foundations. Now it is believed to be larger (referring only to law-books proper, and excluding statutes), more complete, and in a better condition than any other law library in the United States, with the possible exception of the national library at Washington."

There are also given many more details and tables of statistics, but these extracts are sufficient to show the marvellous progress which the school has made under the guidance of the present Dean and the unqualified success of the system which he originated.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting all the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — WARRANT OF ARREST — ISSUANCE ON SUNDAY. — Where a seaman learned that a vessel was about to proceed to sea, having unexpectedly changed her day for sailing, and that in consequence his wages would not be paid, it was held that a court of admiralty would allow a warrant of arrest to issue on Sunday, though the State law forbade the service of civil process on Sunday, and though, under section 914, Rev. St., such State regulation might apply to the law side of the courts of the United States. *Pearson v. The Alisalja*, 44 Fed. Rep. 358.

BILLS AND NOTES — COLLATERAL SECURITY. — Plaintiff was the holder of an interest-bearing note, secured by a mortgage on land, which she had bought from the defendant investment company. The note bore interest-coupons which were payable at the business office of the defendant, and it was the defendant's custom to pay the coupons when due, whether or not the maker had already paid the interest. Held, that the receipt and payment of the coupons by the defendant was a purchase by it of the coupons, and not an extinguishment; and that in the event of a coupon not being paid by the maker of the note, the defendant, as holder of the coupon, was entitled to share *pro rata* in the security of the mortgage. *Champion v. Hartford Investment Co.*, 25 Pac. Rep. 590 (Kan.).

COMMON CARRIERS — DELAY — VIOLENCE OF STRIKERS. — A common carrier is not liable for delay in the shipment of goods caused solely by strikers, who, by the use of lawless and irresistible violence, prevent his men from working. *Missouri Pac. Ry. Co. v. Leti*, 14 S. W. Rep. 1062 (Tex.).

CONSTITUTIONAL LAW — ELECTIONS — CUMULATIVE VOTING. — Const. Mich., which provides for a representative form of government, and gives to every qualified male citizen the right to vote at all elections, impliedly prohibits any elector from casting more than one vote for any candidate for office. Hence, Acts Mich., 1889, No. 254, which provides that each elector may mass his votes upon one candidate for the office of State representative by casting as many votes for such person as there are representatives to be elected in the elector's district, is unconstitutional.

Such act is unconstitutional for the further reason that voters in districts where only one representative is to be elected are placed at a disadvantage. *Maynard v. Board Dist. Canvassers*, 47 N. W. Rep. 756 (Mich.).

CONSTITUTIONAL LAW — KILLING INFECTIOUS ANIMALS — STATUTORY CONSTRUCTIONS. — A statute of Massachusetts provides that "in all cases of glanders, the commissioners having condemned the animal, shall cause it to be killed without appraisement." An action of tort was brought for killing the plaintiff's horse, and it was held, the order of the commissioners was no defence unless the animal was in fact diseased. It was admitted that this construction was likely to make the statute a dead letter, as no one would be found to undertake the risk of liability; but the construction is the natural one, and any other would make the statute unconstitutional, for the State cannot order healthy horses to be killed without compensation to the owners. Devens, Allen, and Knowlton, JJ., dissent on the ground that the State could give the commission power to decide finally whether the animal was dangerous or not, and that it did so here. *Miller v. Horton*, 26 N. E. Rep. 100 (Mass.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — An act of the Legislature of Georgia lays a tax upon all persons engaged in the business of buying and selling "futures" within the State. Held, that this act applied to an agent of a firm in another State, soliciting customers in the State of Georgia; and that the act was not a violation of the interstate commerce clause of the Constitution of the United States, inasmuch as the business of dealing in "futures" was generally held to be gambling, and the clause in question was not intended "to protect interstate gambling." *Alexander v. State*, 12 S. E. Rep. 408 (Ga.).

CONSTITUTIONAL LAW — JURY OF THE VICINAGE. — The Code of California provides that the State may have a change of venue in a criminal action "on the application of the district attorney, if from any cause no jury can be obtained for the trial of the defendant in the county where the action is pending. Held, that the provision is void, being in conflict with the Bill of Rights of California, which provides that "the right of trial by jury shall be secured to all and remain inviolate," the right secured being the right to trial by a jury of the vicinage, as it existed at common law. *People v. Powell*, 25 Pac. Rep. 481 (Cal.).

CONSTITUTIONAL LAW — ORIGINAL PACKAGES — INTOXICATING LIQUORS. — Act Pa., May 13, 1887, § 17, making it an offence to sell intoxicating liquor to a person of known intemperate habits, is not unconstitutional as an infringement of the commercial power of Congress, when applied to sales in the original package in which the liquor was imported. *Commonwealth v. Zelt*, 21 Atl. Rep. 7 (Pa.).

CONSTITUTIONAL LAW — POWER OF SCHOOL BOARDS. — While the Legislature may have authority to confer upon boards of education of cities power to establish separate schools for the education of white and colored children, unless such authority be expressly granted, a board of education has no such power. *Knox v. Board of Education*, 25 Pac. Rep. 616 (Kan.).

CONVERSION — WHAT CONSTITUTES. — The lessees of a bar-room executed a chattel mortgage on the fixtures to their landlord, the mortgage providing that the lessees should be entitled to the possession of the mortgaged property. The lessees assigned their lease to third persons. The landlord refused to allow them to remove the mortgaged property. Held, that this did not constitute a conversion by the landlord, since the control of the room passed absolutely to the assignees of the lease, and the plaintiffs were not bound to respect the landlord's prohibition. *Dosier v. Pillot*, 14 S. W. Rep. 1027 (Tex.).

EQUITY JURISDICTION — QUIETING TITLE. — The plaintiff had sold the land in question with a covenant of warranty. Subsequently the land was sold by a sheriff at a tax sale for delinquent taxes of a prior owner. Through an informality in the proceedings, if objection were taken of it before a deed was given to the purchaser at such sale, the sale was void, and could be set aside. Held, that though, as a general rule, a party cannot maintain a suit to remove a cloud, or a bill *quia timet*, who has no other interest than that he has sold the property with a covenant of general warranty, yet in a case where an adverse title would be acquired unless he took steps to prevent it, he may bring a bill of *quia timet*. *Jackson v. Kittle*, 12 S. E. Rep. 484 (W. Va.).

EXTRADITION — OFFENCE OF POLITICAL CHARACTER. — Murder incidental to and forming a part of political disturbances is an offence of a political char-

acter, and, therefore, not extraditable. To be incidental to the uprising, the offence must be committed with the intention of assisting it. *In re Castioni* [1891], 1 Q. B. 149 (Eng.).

NEGLIGENCE — DEFECTIVE BRIDGES. — A city is only bound to maintain bridges of sufficient strength to afford facilities for the ordinary travel, and therefore a person cannot recover for an injury caused by driving upon the bridge a steam traction-engine, with a water-tank and threshing-machine attached, without showing that the bridge was designed to carry loads of equal weights, or that this was an ordinary use. One who contemplates going upon a bridge with an unusual weight must himself ascertain the probable sufficiency of the bridge. *City of Wabash v. Carver*, 26 N. E. Rep. 42 (Ind.).

NEGLIGENCE — ELECTRIC CARS — DUTY TO KEEP A LOOKOUT. — The sounding of his gong by the motor-man of an electric street-car, which frightens a team hitched at the side of a street, causing it to run away, is not of itself negligence. The court says: "It was the duty of the driver to watch the track upon which the car was being propelled, and to avoid collisions and accidents upon the track. He was not required, we think, to keep a lookout for teams not upon or approaching the track." *North Side St. Ry. Co. v. Tippins*, 14 S. W. Rep. 1067 (Tex.).

NEGLIGENCE — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE — IMPUNITABILITY. — Defendant used in connection with his coke works a railroad which formed the arc of a circle, and was crossed twice by a common carriers' railroad, which subtended the arc as a chord. By the negligence of his servant, defendant's engine collided with a passenger train at one of the crossings. Just before the collision, the servant reversed the engine, shut off steam, and jumped. The concussion threw open the throttle, and the engine ran backwards around the arc and struck the train again at the other crossing, injuring the plaintiff. Held, that the negligence of defendant's servant was the proximate cause of the injury, because no self-operating cause intervened. Held, further, that the contributory negligence of the carrier would not be imputed to the plaintiff, expressly overruling *Lockhart v. Lichtenhaler*, 46 Pa. St. 151. *Bunting v. Hogsett*, 21 Atl. Rep. 31 (Pa.).

NEGLIGENCE — PROXIMATE CAUSE. — A railroad employé was wrongfully injured in an accident, and afterwards, by mistake, poison was given him sufficient to cause the death of a well man, from the immediate effects of which he died. There was evidence tending to show that the injuries received were mortal, and that they caused him to succumb more quickly to the poison than if he had been well. The court below charged that, under the evidence, the death of the plaintiff's intestate must have resulted either from the injury he received, or from the poison he took; that the injury and the poison could not both have caused his death; that if he died from the effects of the poison, then they must find for the defendant, although his death was accelerated by reason of the injury received; or, if he died sooner from the effects of the poison than he would have died if he had not been injured. It was held that the charge was wrong; if the result was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of itself to produce the effect, and only hastened the result, both causes necessarily contributed to the result. *Thompson v. Louisville & N. R. Co.*, 8 So. Rep. 406 (Ala.).

QUASI-CONTRACT — EQUAL EQUITIES. — A beneficiary named in a policy of insurance, but having no insurable interest in the life of the insured, paid the dues for the insured. Held, that he could not recover as money paid on a consideration which has failed, the policy being void only as to him, and the company having no notice that he, and not the insured, was paying the dues. *Knights and Ladies of Honor v. Burke*, 15 S. W. Rep. 45 (Tex.).

REAL PROPERTY — DESCENT — MURDER OF ANCESTOR BY HEIR. — A murdered his daughter for the express purpose of inheriting her land. He was convicted, and sentenced to death. Held, that the land did not descend to A, although he was the heir if the murder were not considered. *Shellenberger v. Ransom*, 47 N. W. Rep. 700 (Neb.).

Riggs v. Palmer, 115 N. Y. 506, and *Owens v. Owens*, 100 N. C. 240, are discussed by the court, and the reasoning in the former is accepted. See *ante*, p. 394.

REVIEWS.

FORMS IN CONVEYANCING, AND GENERAL LEGAL FORMS, comprising Precedents for Ordinary Use, and Clauses adapted to Special and Unusual Cases, with Practical Notes. Second Edition, Revised. By Leonard A. Jones. Houghton, Mifflin, & Co., Cambridge, Mass. 1891. 8vo. 940 pages.

The name of this well-known writer is of itself a sufficient guaranty of accurate, painstaking discrimination, and the obligation appears to be as amply discharged in this as in his other works. The first edition of this particular book, which appeared five years ago, seemed a very unique undertaking; but the favor with which it has been received by the profession everywhere has shown that the author is not wrong in the opinion which he thus expresses in the prefatory note to the present edition: "I am assured that a Book of Forms may be national in character and use, though in this country such a book has commonly been regarded as a local one."

The selection of forms seems excellent in every way; their language is at once brief and comprehensive, leaving but few loopholes for discussion. The topics of the present edition are: Acknowledgments, Agreements, Appointments, Apprenticeship, Arbitration, Assignments, Assignments for the Benefit of Creditors, Powers of Attorney, Auction Sale of Real Estate, Bills of Sale, Bonds, Building Contracts, Charter Party, Composition with Creditors, Declarations of Trust,* Deeds, Guaranty, Leases, Mortgages, Mortgages of Railroads, Notices, Partnership, Party-Wall Agreements, Patents, Pledges and Collateral Securities, Protests,* Railroad Car Trust Agreements,* Railroad Consolidation, Releases, Separation Deeds between Husband and Wife, Settlements, Trade-Marks, Wills. The starred topics are new with this edition, as are also notes, adapted to the several States, upon the subjects of Witnesses to Deeds, Seals, Dower and Curtesy, Homestead Exemptions, Dower and Homestead Releases, Competency of Testators as to Age, and Witnesses to Wills.

What is most to be regretted is that the author has not devised some means of indicating, at not too great an expense of space, what forms have run the gauntlet of judicial opinion, and what ones still remain unadjudicated expedients. It is believed that this might be done to advantage by the addition of brief notes, or the citation of a few leading cases here and there upon questions of construction. The latter feature is entirely absent, the references being exclusively to statutes. But, after all, this handy compilation fills so admirably what was before such a serious want, especially among younger lawyers, that one cannot find the heart to quarrel with Mr. Jones as to the best method of execution.

W. B.

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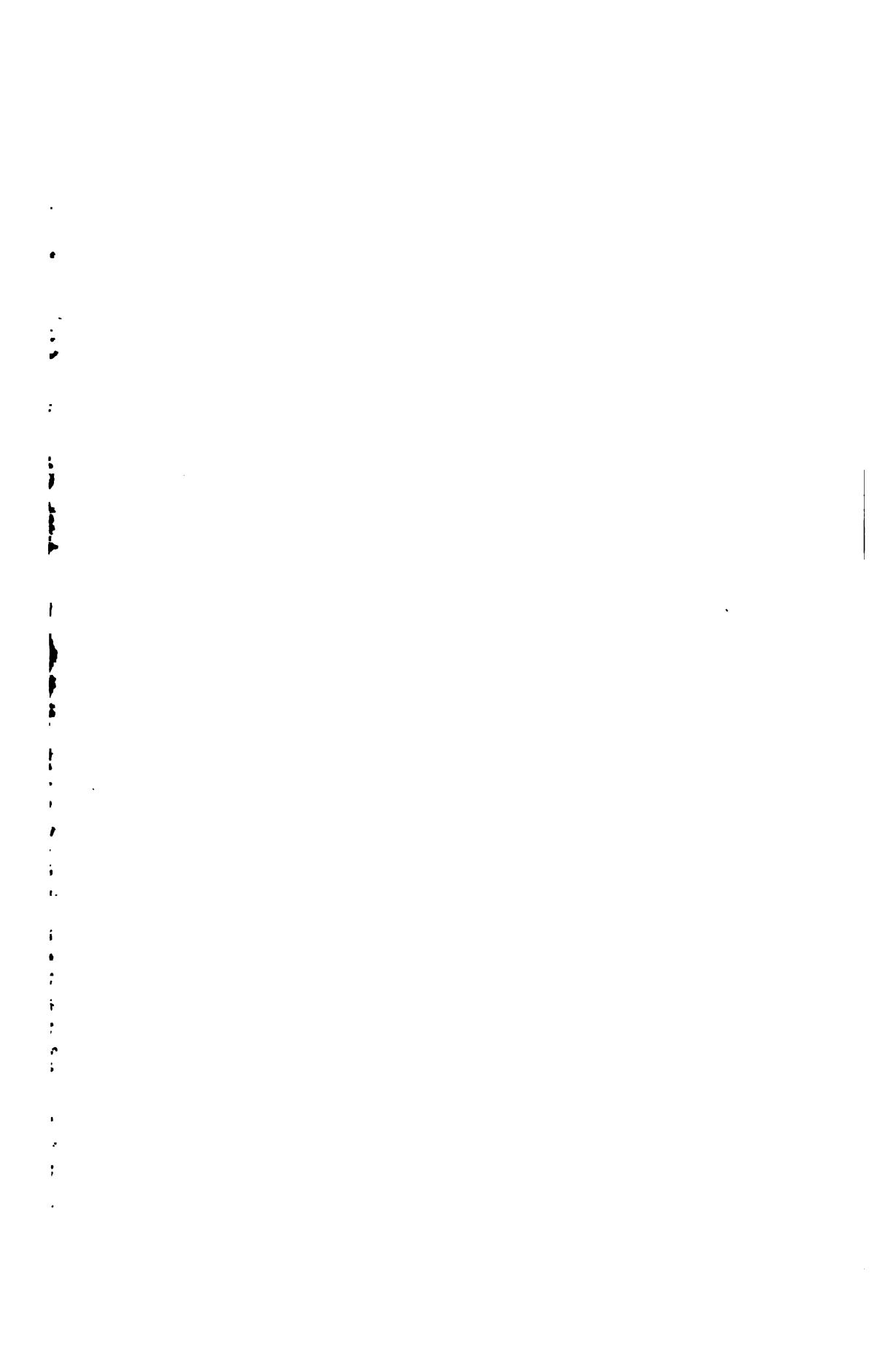
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